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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. ----------

CHARLES P. LUCAS, BRUCE GREEN, JR., DOROTHY M. BACON, JOHN T. GREEN, ALFRED HEAD, EDWIN L. PARMS, KENNETH W. CLEMENT, RUSSELL M. JONES and ALICE LEV,

Appellants,

vs.

JAMES A. RHODES, INDIVIDUALLY and AS GOVERNOR OF THE STATE OF OHIO, TED W. BROWN, SECRETARY OF STATE OF OHIO, JOSEPH J. LoPRESTI, GOVERNOR'S ADMINISTRATOR, and RAY T. MILLER, ALEXANDER L. DeMAIORIBUS, DAN W. DUFFY and SAUL G. STILLMAN, MEMBERS OF BOARD OF ELECTIONS OF CUYAHOGA COUNTY, OHIO,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT IN AND FOR THE NORTHERN DISTRICT OF OHIO.

JURISDICTIONAL STATEMENT.

OPINION BELOW.

The opinion below has not been officially or unofficially reported, but a copy is appended hereto in full as Appendix A, *infra*. The opinion was also adopted as findings of fact and conclusions of law by the trial court.

GROUND ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

Jurisdiction of this Court to review on direct appeal is conferred by 28 U. S. C. § 1253.

QUESTION PRESENTED.

Whether Section 3521.01 of the Ohio Revised Code, which creates the congressional districts now in effect in the State of Ohio, violates Article I, Section 2 of the United States Constitution.

STATEMENT OF CASE.

Summary of Proceedings and Evidence.

In May, 1965, appellants, plaintiffs below, filed suit in the District Court for the Northern District of Ohio, Eastern Division, challenging the constitutionality of Sec. 3521.01, Ohio Revised Code, a statute known as Amended Substitute House Bill No. 18 passed on December 17, 1964 by the Ohio General Assembly "relative to the apportionment of congressional districts." Joint Exhibit No. 1. The provisions of the statute became effective March 29, 1965, and an election of the congressmen from Ohio took place on November 8, 1966 pursuant thereto.[1] The trial was

[1] The Appellants sought injunctive relief to bar the 1966 election of Congressmen from districts created pursuant to Sec. 3521.01, Ohio Rev. Code. Appellants filed their application for a three-judge court concurrent with the filing of the Complaint on May 11, 1965, but it was not until January 28, 1966, that an order was entered designating a three-judge panel. Nominating petitions for Congress were filed by February 2, 1966, and primary elections for Congressmen were conducted on May 3, 1966. Sec. 3513.05, Ohio Rev. Code; Sec. 3513.01, Ohio Rev. Code. The parties were notified by letter dated August 19, 1967, that the hearing on the merits would be held on September 28, 1967, less than six weeks prior to the general election date. Thereupon, appellants requested continuance until after the general election date, which request was granted. The reason stated in the request was that chief counsel for appellants was engaged in an extended trial in state court.

For some reason, not disclosed, the majority opinion contained the following remark concerning appellants' request for continuance, "We do not choose to speculate as to the motives of counsel in that respect." (p. 22) The appellants' counsel had no "motives" other than for the reason stated and to follow

held on November 9, 1966, one day following the general election.

The appellants are residents, citizens, electors and tax payers in Ohio. The appellees, defendants below, are state officials responsible for the operation of the machinery for the election of congressmen from Ohio. The standing of the appellants and the capacity of appellees was set forth in Paragraphs I and III of the Complaint, admitted by the appellees in their Answer, and acknowledged by the court. (p. 6) [2] See 42 U. S. C. §§ 1983 and 1988.

The evidence consisted of documents stipulated by the parties, or introduced by one party without objection by the other, and testimony of two witnesses for the appellees.

There are two sets of population figures for the congressional districts in Ohio established by Sec. 3521.01,

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(Continued from preceding page)

existing decision of Supreme Court and other Federal Courts. Suit had been filed within six weeks of the effective date of the statute, and more than eight months prior to the last date upon which nominating petitions for Congress must be filed. Sec. 3513.05, Ohio Rev. Code.

With all due and proper respect to the administrative burdens of the court, the court did not give priority to the within case. More than eight months elapsed between the date of appellants' application for a three-judge court on May 11, 1965, and the granting thereof on January 28, 1966, and more than eight additional months elapsed between the appointment of the three judges and the original hearing date. Upon receiving notice of the September 28, 1966, hearing date, appellants' attorneys recognized that under no conditions would they be able to enjoin or set aside the November, 1966, general election for Congressmen and therefore requested a short continuance. See *Bush v. Martin*, 224 F. Supp. 499 (S. D. Tex. 1963), *aff'd Martin v. Bush*, 376 U. S. 222 (1964), and the multitude of congressional and legislative apportionment cases thereafter decided. The majority suggests that appellants' counsel are responsible for the delay in these proceedings. Counsel respectfully submit this is not accurate.

[2] All page references to the majority opinion and the dissent, Appendix A, are to the page numbers appearing in boldface type, in parentheses.

Ohio Rev. Code. One set is contained in appellants' Exhibit 1, showing the map of Ohio for Amended Substitute House Bill No. 18, published by the Ohio Legislative Service Commission on December 18, 1964. The second set is contained in appellants' Exhibit 2, the Congressional District Data Book Supplement published in August, 1966 by the Bureau of Census of the Department of Commerce. These population figures were incorporated in Table I of the majority opinion, and are as follows:

CONGRESSIONAL DISTRICT POPULATIONS

	Am. Sub. H.B. 18	*Census Bureau*
District No. 1	425,822	417,614
2	438,299	446,507
3	437,689	439,438
4	354,129	354,129
5	354,537	354,537
6	380,847	380,847
7	369,910	369,910
8	414,929	414,929
9	456,931	456,931
10	366,741	366,741
11	436,933	436,933
12	331,202	319,968
13	398,141	398,141
14	457,774	457,774
15	351,760	362,994
16	434,465	434,465
17	414,871	414,871
18	411,103	411,103
19	435,743	435,743
20	440,398	439,835
21	426,294	426,216
22	394,835	396,089
23	386,368	385,755
24	386,676	384,927

There is agreement between these sources as to the population in 14 of the 24 districts. The differences are found in the large metropolitan areas where there is more than one congressional district within a county, and in those additional areas where county boundary lines were ignored in the formation of districts. (Districts 1, 2, 3, 12, 15, 20, 21, 22, 23 and 24)

The Bureau of Census population figures are derived from the 1960 census for population tracts. See appellants' Exhibit 2. According to the testimony of appellees' witness, Representative Charles Kurfess, the only population figures available to the Committee to Study Congressional Redistricting were the 1960 census for counties and political subdivisions. (Tr. 44) This Study Committee also referred to other data provided by the Department of Development of Ohio, the Citizens League of Greater Cleveland and others, but none of this supporting data was introduced in evidence or available at the trial. (Tr. 44-45)

The most significant population variance between these sets of figures is for District No. 12, the smallest congressional district in the state. The Ohio Legislative Service Commission document provides a population of 331,202, and the Census Bureau evidences a population of 319,968, a difference of 11,234. Appellants submit that the Census Bureau figures are the more accurate and impartial. The majority opinion stated that this difference was not "critical to decision of this case." (p. 8)

An analysis of the population figures, in accordance with the tests and measurements adopted by the courts in congressional districting cases and incorporated in Table I of the majority opinion, is as follows:

	Am. Sub. H.B. 18	*Census Bureau*
1. Population by 1960 Census		
Largest District (14)	457,774	457,774
Average District	404,333	404,333
Smallest District (12)	331,202	319,968
2. Per Cent (%) of Variance from Average District		
Largest District (14)	+13.2%	+13.2%
Smallest District (12)	—18.1%	—20.9%
Total % of Variance	31.3%	34.1%
3. Population Difference between Largest & Smallest Districts	126,572	137,806
4. Ratio between Largest and Smallest Districts	1.382 to 1	1.430 to 1

	Am. Sub. H.B. 18	*Census Bureau*
5. Average % of Variance		
all Districts	7.69%	7.71%
Districts above Average	6.10%	6.93%
Districts below Average	8.39%	8.40%
6. Number of Districts with more than:		
5% Variance from Average	17	16
6% Variance from Average	14	14
7% Variance from Average	14	14
8% Variance from Average	12	12
9% Variance from Average	7	8
7. Per Cent (%) of Population Necessary to Elect Majority of Congressmen	46.2%	46.2%

The appellants submitted this case to the Court solely on the question of whether Sec. 3521.01, Ohio Rev. Code, violates the constitutional rights of plaintiffs established by Article I, Section 2 of the Constitution of the United States.

The appellants withdrew all averments relating to the argument that the Ohio statute violated the Due Process, Equal Protection, and Privileges and Immunity Clauses of the Fourteenth Amendment. (Tr. 5, 6, 7) As emphasized in *Wesberry v. Sanders*, 373 U. S. 1 (1964), more fully discussed hereinafter, the issue here raised under Article I, Section 2 is a "wholly separate question" from those presented by an attack on the statute under the Fourteenth Amendment.[3] See 376 U. S. 1, 8, n. 10.

Accordingly, appellants offered no evidence under Paragraphs VIII, XI, XII, and XIV of the Complaint where reference is made to the Fourteenth Amendment, because

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[3] The hearing in this case was held prior to the ruling of the Court in *Duddleston v. Grills*, ____ U. S. ____, 35 U. S. L. WEEK 3233 (U. S. Jan. 10, 1967). See discussion at p. 12. The statistical data adduced in this case and analyzed above fully supports the conclusion that the congressional districts created by Sec. 3521.01, Ohio Rev. Code, contravene the equal protection clause of the Fourteenth Amendment now, apparently, applicable to congressional districting by states.

appellants believe that the issue of whether Section 3521.01, Ohio Rev. Code, violated Article I, Section 2 of the Constitution of the United States is precise, and that the evidence in the case fully and clearly demonstrated that Sec. 3521.01, Ohio Rev. Code, is unconstitutional.

Appellants did not contend, or request the court to find, that the congressional districts were improperly constituted because of partisan or political motivation. Such issue, appellants stated, is non-justiciable. (Tr. 21) Sound reasoning for a "hands-off" posture by the court on this type of issue is stated in *Jones v. Falcey*, 48 N. J. 25, 222 A.2d 101 (1966), wherein the court said:

> "Perhaps it would be more accurate to say such issues are beyond judicial condemnation, not because the controversy is beyond the jurisdictional authority of the Court, but rather because the Constitution does not prescribe a single approach or motivation for the drawing of district lines, and hence the Constitution is not offended merely because a partisan advantage is in view. Indeed, it would be difficult to separate partisan interests from other interests, since partisan interests may well be but a summation of such other interests. In addition, it would seem impossible for a court to pass upon the validity of political interests without itself making a political judgment or appearing to do so. For these reasons the view generally taken in this new area of judicial activity is that, if the mathematics are acceptable, it rests with the voters, rather than the Court, to review the soundness of the partisan decisions which may inhere in the lines the Legislature drew. Actual experience of course may generate exceptions to that approach." (222 A. 2d at 105)

See also *W. M. C. A. v. Lomenzo*, 238 F. Supp. 916 (S.D. N.Y.), *aff'd* 382 U. S. 4 (1965); *cf. Grills v. Branigan*, 255 F. Supp. 155, 159 (1966) (Holder, J., dissenting).

The Opinion of the Trial Court.

On May 10, 1967, a majority of the Court, pursuant to Rule 52(a), Federal Rules of Civil Procedure, entered its finding of facts and conclusions of law upholding the constitutionality of Sec. 3521.01, Ohio Rev. Code. The order that was thereafter filed denied all relief requested by appellants.

After reviewing the population data set forth above, and citing *Kilgarin v. Hill*, __ U. S. __, 35 U.S.L. Week 3293 (U. S. Feb. 20, 1967) as to the burden of proof required, the majority reached a *preliminary* conclusion, as follows:

> "The conclusion is inescapable that in the congressional districting case before this Court the population inequality shown by plaintiffs requires justification by defendants." (p. 10)

The responsibility of appellees in "justification" of the Sec. 3521.01, Ohio Rev. Code, was defined by the majority opinion as follows:

> "So it was incumbent on Ohio's legislature to draw up a plan which would represent a good faith effort on its part to meet constitutional standards, and which would be practical, workable, and as fair as men could make it, in light of available criteria suggested by United States Supreme Court decisions as of November 10, 1964." (p. 17)

The criteria upon which the Ohio General Assembly acted were contained in the Report of the (Joint) Committee to Study Congressional Redistricting. Joint Exhibit No. 2. The majority opinion made reference to these criteria only by citing the testimony of Representative Kurfess (Tr. 40-42), and stated, without any legal analysis of these criteria, as follows:

"The other evidence presented in this case is convincing that these criteria were in fact followed in good faith." (p. 21)

The majority then concluded:

"* * * the State has presented rational reasons for seeming population variation between congressional districts. We find those reasons to be legally acceptable upon the principles we have articulated herein * * *"

"We hold that upon the facts presented, giving due recognition to purely academic propositions as well as to practical feasibility the Ohio Plan of Districting affords practical equality of congressional districts as is constitutionally required. The Court finds Section 3521.01 of the Ohio Revised Code to be constitutional in all respects." (p. 24)

Judge Celebrezze, Circuit Judge, entered a strong dissent, which is cited by appellants in their Argument.

THE QUESTION PRESENTED IS SUBSTANTIAL.

SECTION 3521.01, OHIO REV. CODE, WHICH CREATES THE CONGRESSIONAL DISTRICTS NOW IN EFFECT IN THE STATE OF OHIO, VIOLATES ARTICLE I, SECTION 2 OF THE UNITED STATES CONSTITUTION.

The Constitutional Standard of Article I, Section 2 Applicable to Congressional Representation Is Population Alone.

The landmark case of congressional apportionment is *Wesberry v. Sanders*, 376 U. S. 1 (1964). The fundamental constitutional principle is there stated in simple and emphatic terms. The Court said,

"We hold that, construed in its historical context, the command of Art. I, Sec. 2, that Representatives be

> chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." (*Id.* at 7-8)

and,

> "It would defeat the principle solemnly embodied in the Great Compromise—equal representation in the House for equal numbers of people—for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others." (*Id.* at 14)

and further,

> "While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us." (*Id.* at 18)

The first construction of the constitutional standards enunciated in the *Wesberry* case appeared in Justice Harlan's dissent, as follows:

> "In the last congressional election, in 1962, representatives from 42 States were elected from congressional districts. In all but five of those States, the difference between the populations of the largest and smallest districts exceeded 100,000 persons. A difference of this magnitude in the size of districts the average population of which is less than 500,000 is presumably not equality among district 'as nearly as is practicable,' although the court does not reveal its definition of that phrase." (*Id.* at 20-21)

In the series of legislative apportionment cases decided by the Supreme Court in 1964, the opinions reflected

on the objectives and constitutional standards set down in the *Wesberry* case. In *Reynolds v. Sims*, 377 U. S. 533 (1964), the Court said,

> "In Wesberry v. Sanders, (citations omitted) we held that attacks on the constitutionality of congressional districting plans enacted by state legislatures do not present nonjustifiable questions and should not be dismissed generally for 'want of equity.' We determined that the constitutional test for the validity of congressional districting schemes was one of substantial equality of population among the various districts established by a state legislature for the election of members of the Federal House of Representatives.
>
> "In that case we decided that an apportionment of congressional seats which 'contracts the value of some votes and expands that of others' is unconstitutional, since 'the Federal Constitution intends that when qualified voters elect members of Congress each vote be given as much weight as any other vote * * *.'" (*Id.* at 559)

and,

> "* * * Wesberry clearly established the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State." (*Id.* at 561)

The Supreme Court stated in the *Reynolds* case that in addition to drawing on different clauses of the Constitution, a stricter constitutional standard is required for congressional districts than for legislative apportionment. The Court said,

> "In Wesberry v. Sanders, supra, the Court stated that congressional representation must be based on population as nearly as is practicable. In implementing the basic constitutional principle of representative gov-

ernment as enunciated by the Court in Wesberry—equality of population among districts—some distinctions may well be made between congressional and state legislative representation. Since, almost invariably, there is a significantly larger number of seats in state legislative bodies to be distributed within a State than congressional seats, it may be feasible to use political subdivision lines to a greater extent in establishing state legislative districts than in congressional districting while still affording adequate representation to all parts of the State. To do so would be constitutionally valid, so long as the resulting apportionment was one based substantially on population and the equal-population principle was not diluted in any significant way. Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting." (*Id.* at 578-79)

The majority opinion recognized that "a more strict constitutional standard is demanded in congressional districting cases than is required in state legislative reapportionment cases." (p. 14) However, the distinction of standards between congressional district cases, on the one hand, and legislative apportionment cases, on the other, appears to have been minimized, if not extinguished, by the Supreme Court's decision in *Swann v. Adams*, ____ U. S. ____, 35 U. S. L. Week 4101 (U. S. Jan. 10, 1967), a legislative apportionment case and the Court's per curiam order the same day in *Duddleston v. Grills*, ____ U. S. ___, 35 U. S. L. Week 3233 (U. S. Jan. 10, 1967), a districting case, which vacated the judgment and remanded to the District Court with instructions to reconsider "in light of *Swann v. Adams*, No. 136, October Term, 1966, decided this day. *Wesberry v. Sanders*, 376 U. S. 1, and *Reynolds v. Sims*, 377 U. S. 533." See footnote 1, page 17, of majority opinion.

In the many cases arising since the *Wesberry* case, the federal and state courts have formulated and articulated reasonable, logical and consistent standards against which the constitutionality of any congressional districting plan may be measured.

In the case of *Drum v. Seawell*, 250 F. Supp. 922 (M.D.N.C. 1966), the Court, in reviewing the North Carolina Congressional Redistricting Act, said,

> "While rigid mathematical standards are not the sine qua non of constitutional validity, practical and rational equality is required. Such equality recognizes only minor deviations which may occur in the recognition of rational and legitimate factors, free from the taint of arbitrariness, irrationality and discrimination." (*Id.* at 924)

In the Maryland case of *Maryland Citizens Comm. for Fair Cong. Redist. v. Tawes*, 253 F. Supp. 731 (D. Md. 1966), after citing the *Drum* case, the court said,

> "Even if a district plan initially comports with the one-to-one formula, discrepancies may be expected to arise with changing conditions. Such discrepancies are unavoidable and must be tolerated for a time, till the next census, but in initial districting the aim should be to come as closely as possible to a one-to-one ratio." (*Id.* at 733)

The court reviewing the Texas congressional redistricting plan in *Bush v. Martin*, 251 F. Supp. 484 (S. D. Tex. 1966), articulated a two step test. It said,

> "* * * we must ascertain, first, whether there has been a 'faithful adherence' to the principle of equality and, second, whether deviations from this principle were the result of recognizing 'certain factors that are free from any taint of arbitrariness or discrimination.'" (*Id.* at 497)

Further, in that case, the court noted the effect of overpopulation in a congressional district. It said,

"But it is obvious that in a district which is over populated it is not just the excess people who suffer; every person in such a district has his vote diluted." (*Id.* at 499)

That population is the sole criteria for creation of congressional districts is emphatically stated in the case of *Preisler v. Secretary of State*, 257 F. Supp. 953 (W.D. Mo. 1966), *Aff'd sub nom. Kirkpatrick v. Preisler*, 35 U. S. L. Week 3233 (U. S. Jan. 10, 1967). The court said:

"The basic constitutional principle of equal representation established by Art. I, Sec. 2 forbids and eliminates, so far as congressional representation is concerned, the consideration of any factor other than population. Use of such words as 'feasible' and 'practicable' in a careful statement of the fundamental constitutional principle constitutes but a recognition that the familiar doctrine of *de minimis* is applicable and is designed to make clear that a State legislature would not be expected to create entirely new political subdivision lines in order to have absolute and precise mathematical equality in its congressional districts." (257 F. Supp. 953, 973)

See also *Meeks v. Anderson*, 229 F. Supp. 271, 273 (D. Kan. 1964).

The majority opinion acknowledged that population is the "determinant factor" in congressional districting cases. (p. 15)

The *de minimis* test was also adopted in *Calkins v. Hare*, 228 F. Supp. 824 (E. D. Mich. 1964). The Court said,

"One factor and one alone is controlling, the factor of population. It is true that the Wesberry court speaks of one vote being 'as nearly as practicable' worth that of another, but we do not see in these words an escape hatch for the reluctant. Nor in the caveat that the weight of votes need not be math-

ematically precise. What is meant here is merely that the ideal district lines enclosing mathematically equal areas of population may make minor departures here and there from such ideal, in accordance with the needs of the situation, and without 'unnecessarily' (Wesberry, page 535) abridging the people's rights. But these are minor concessions to practicability, the avoidance of ideal mathematical precision, merely. They are the application in this field of the well-known de minimis doctrine. Should the concessions made result in substantial (not minimal) and unnecessary inequalities between the districts, the lines of unconstitutionality will have been crossed." (*Id.* at 829)

See also *Jones v. Falcey, supra,* 222 A. 2d at 108. To this extent the majority opinion, at p. 15, stated that "* * * the limits of 'practicality' have been construed to include only *de minimis* deviations from exact equality." Yet the court, under the guise of 'practicality,' avoided the application of the standard. (pp. 20-24)

The defense has, on occasion, argued that a redistricting act of the legislature is entitled to a presumption of constitutionality. This argument has been rejected. In the case of *Calkins v. Hare, supra,* the first district court decision on the substantive questions after the *Wesberry* case, the court said,

"In our consideration of this case, we start with the principle that the right of franchise is 'a fundamental political right, because preservative of all rights.' This being the case we do not equate the presumption of constitutionality in this situation to that employed in the general police power cases, involving the regulation of health or morals, or the fixing of guide lines for a state's experimentations in matters of social welfare or economic controls. In these cases the states are properly given a wide latitude. But where we are concerned with a basic constitutional right our

> requirements are infinitely more rigorous. Here the cloak of constitutionality is not loosely worn. There is little elbow room for freedom of movement. The fit must be precise. We do not experiment with freedome of speech, freedom of worship or freedom to vote. These are among the basic civil rights of man." (*Id.* at 827)

See also, *Kilgarin v. Hill, supra.* The majority opinion allegedly adopts this standard. (p. 13)

Nor may the court presume, in the absence of legislative history, that the legislature had adequate and sufficient reasons for redistricting in the manner it did. In the case of *Jones v. Falcey, supra,* the court said,

> "The record contains no explanation for any of the deviations described above. The Attorney General says we should assume that adequate reasons do exist, in the absence of proof excluding them. We cannot accept that approach, for here, upon the face of things, the constitutional command for equality has been breached." (*Id.* at 109)

In finding "justification" for the Ohio statute, the majority concluded that the "* * * State has presented rational reasons for seeming population variation between congressional districts." (p. 24). In that the record is devoid of factual data or documentary evidence to support the "criteria" allegedly followed by the Ohio General Assembly, other than naked declaration made by Representative Kurfess, the majority had to presume the existence of such evidence to reach the conclusions appearing in their opinion.

A Review and Analysis of Federal and State Decisions Clearly Demonstrates That the Ohio Congressional Districting Plan Created by Section 3521.01, Ohio Rev. Code, Is Unconstitutional.

Beginning with the Michigan case of *Calkins v. Hare, supra,* and ranging through *Jones v. Falcey, supra,* the most recently reported case, and *Wells v. Rockefeller,* ____ F. Supp. ____ (No. 66-1976) (S. D. N. Y.), the most recent federal court case, the federal and state courts have reviewed the constitutionality of congressional redistricting statutes in light of *Wesberry v. Sanders, supra.* Each of these courts has discussed and analyzed the *Wesberry* case, has compared *Wesberry* with *Reynolds v. Sims, supra,* and the other legislative apportionment cases, has formulated and articulated standards for measuring the constitutionality of the congressional district plan in question and, as the cases have been reported, cited and discussed the opinions handed down in the other courts.

In *Swann v. Adams, supra, Duddleston v. Grills, supra,* and *Kirkpatrick v. Preisler, supra,* the Supreme Court has affirmed the criteria formulated by the state courts and lower federal courts.

The principal approach taken by all of the courts has been to translate the constitutional concept of "equal representation for equal numbers of people" into meaningful mathematical symbols. Although all courts have disclaimed mathematical exactness and rigidity, they have, in fact, subjected a congressional district plan to full and proper examination only by the use of tests based upon mathematical considerations.

The *Ohio Congressional Districting Act, Sec. 3521.01, Ohio Rev. Code, fails to meet minimum constitutional standards. Irrespective of the means or techniques of*

measurement, by comparison with each and every congressional districting case decided, the Ohio districts have failed the test.

The majority opinion, at pages 6-7, adopted (without citation) three of the criteria of measurement formulated by the other courts, as follows: first, the numerical ratio of the population of the largest district compared with the population of the smallest district; second, the per cent of variances of the population of the largest and smallest districts from the population of the average or ideal district; and third, the excess, or lack, of population in the largest or smallest district when compared with the population of the average district. The Court concluded that "three foregoing tests will suffice." (p. 7) However, the majority opinion chose to ignore the most important standard of evaluation, and the standard most widely used by the courts, that of the difference in population between the largest and smallest districts. In every case decided in this area, the court has viewed this population figure as the most significant. In those states where congressional districting plans have been reviewed by the courts, the relevant data is as follows:

State	Population Difference between Largest and Smallest Districts	Court Held Plan to Be:
Arkansas[4]	242,541	Unconstitutional
Virginia[5]	214,208	Unconstitutional
Michigan[6]	189,104	Unconstitutional
OHIO[7]	137,806	Constitutional
Missouri[8]	128,355	Unconstitutional
Montana[9]	126,379	Unconstitutional
New York[10]	120,366	Unconstitutional
Maryland[11]	113,505	Unconstitutional
Tennessee[12]	111,830	Unconstitutional
Massachusetts[13]	102,626	Unconstitutional
Missouri[14]	84,655	Unconstitutional
Indiana[15]	84,545	Unconstitutional
Texas[16]	80,892	Constitutional
North Carolina[17]	71,640	Unconstitutional
New Jersey[18]	64,760	Unconstitutional (in part)
Arizona[19]	61,244	Court Plan
Illinois[20]	57,046	Court Plan
New Hampshire[21]	56,715	Constitutional
Alabama[22]	52,120	Constitutional
Montana[23]	20,682	Court Plan
Kansas[24]	15,060	Constitutional
Maryland[25]	5,624	Court Plan

[4] *Park v. Faubus*, 238 F. Supp. 62 (E. D. Ark. 1965).

[5] *Wilkins v. Davis*, 205 Va. 803, 139 S. E.2d 849 (1965).

[6] *Calkins v. Hare, supra.*

[7] *Lucas v. Rhodes*, ____ F. Supp. ____ (No. C 65-264) (N. D. Ohio, 1967) (The within case).

[8] *Preisler v. Secretary of State*, 238 F, Supp. 187 (W.D. Mo. 1965).

[9] *Roberts v. Babcock*, 246 F. Supp. 396 (D. Mont. 1966).

[10] *Wells v. Rockefeller, supra.*

[11] *Maryland Citizens Comm. for Fair Cong. Redist. v. Tawes, supra.*

[12] *Baker v. Clement*, 247 F. Supp. 886 (M. D. Tenn. 1965).

[13] *Dinis v. Volpe*, ____ F. Supp. ____ (No. 66-767-G) (D. Mass. 1967).

[14] *Preisler v. Secretary of State, supra.*

[15] *Grills v. Branigan, supra.*

[16] *Bush v. Martin, supra.*

[17] *Drum v. Seawell, supra.*

(Continued on following page)

In Ohio the difference in population between District No. 14, the largest, and District No. 12, the smallest, is 137,806.

In the first case reviewing the Missouri Congressional Redistrict Act of 1963 (Ch. 128, R. S. Mo.), the relevant data shows a population difference of 128,355 between the largest and smallest districts. *Preisler v. Secretary of State,* 238 F. Supp. 187 (W. D. Mo. 1965). The district court, referring to the opinion of Justice Harlan in the *Wesberry* case, stated that there was "presumptive malapportionment" because the variance was in excess of 100,000. *Id.* at 190. In the Tennessee case of *Baker v. Clement,* 247 F. Supp. 886 (M. D. Tenn. 1965) the court held unconstitutional the 1966 Tennessee Congressional Districting Plan (Ch. 4, P. A. of Extra Ses. of 1965, T. C. A. Sec. 2-502.). It said, "We reject all contentions that the constitutional test has been met where there exists a disparity of 111,830 between the Second and Sixth Districts, a disparity of 100,048 between the First and Sixth Districts, a disparity of 94,953 between the Third and Sixth Districts, and a disparity of 70,117 between the Fourth and Sixth Districts." *Id.* at 896. The population disparity between districts in Ohio is a significantly greater population variance than that reluctantly tolerated by the district courts in the Texas (*Bush v. Martin, supra*) and

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[18] *Jones v. Falcey, supra.*

[19] *Klahr v. Goddard,* 250 F. Supp. 537 (D. Ariz. 1966).

[20] *Kirby v. Illinois State Electoral Bd.,* 251 F. Supp. 908 (N.D. Ill. 1965).

[21] *Levitt v. Maynard,* 202 A.2d 478 (N. H. 1964).

[22] *Moore v. Moore,* 246 F. Supp. 578 (S. D. Ala. 1965).

[23] *Roberts v. Babcock, supra.*

[24] *Meeks v. Avery,* 251 F. Supp. 245 (D. Kan. 1966).

[25] *Maryland Citizens Comm. for Fair Cong. Redist. v. Tawes, supra.*

Indiana (*Grills v. Branigan*, 255 F. Supp. 155 (S. D. Ind. 1966), *rev'd sub nom. Duddleston v. Grills*, 35 U. S. L. Week 3233 (U. S. Jan. 10, 1967)) cases. It far exceeds the maximum limits of 100,000 suggested by Justice Harlan in the *Wesberry* case. 376 U. S. 1, 20-21. As Judge Celebrezze observed, "(e)very case where the population difference between the largest and smallest district exceeded 100,000 held the congressional districting unconstitutional." (pp. d6-7)

The majority opinion is grounded on the assumption that a "good faith effort" to meet constitutional standards was all that was required. (p. 17) The majority may have been mindful of that phrase as used in *Reynolds v. Sims, supra* at 577. Similar language was used in the opinions of the courts in *Meeks v. Avery*, 251 F. Supp. 245, 252 (D. Kan. 1966), and in *Moore v. Moore*, 246 F. Supp. 578, 582 (S. D. Ala. 1965), but in Kansas, the population difference between largest and smallest districts was only 15,060 (a ratio of 1.035 to 1), and in Alabama, was 52,120 (a ratio of 1.132 to 1). In Ohio, the ratio, as shown, was 1.430 to 1.

The population variance between Districts 12 and 14 is more than twice that adopted in the temporary court plan for Arizona (*Klahr v. Goddard*, 250 F. Supp. 537 (D. Ariz. 1966)), and more than twenty-five times greater than the redistricting plan for Maryland (*Maryland Citizens Comm. for Fair Cong. Redist. v. Tawes, supra*). The Kansas legislature adopted a plan that created a population variance between the largest and smallest districts less than one-eighth (⅛) than that existing in Ohio, and the court there found that the Kansas plan only achieved "minimum" constitutional standards. *Meeks v. Avery, supra.*

District 12, with a variance of —20.9% from the average size district in Ohio, has the greatest variance of all the congressional districts in the entire United States. Appellants' Exhibit 3, p. 2006.

The —20.9% variance of District 12 from the average district is almost three times greater than the maximum variance found to be acceptable in Alabama (*Moore v. Moore, supra*) and more than ten times the variance resulting in the Kansas Districting Act. *Meeks v. Avery, supra.* A population variance of 9.9% from the average district was held unconstitutional in the Missouri case (*Preisler v. Secretary of State, supra*), as were 14% variances in the Maryland and Tennessee cases. *Maryland Citizens Comm. for Fair Cong. Redist. v. Tawes, supra; Baker v. Clement, supra.* Judge Celebrezze observed, "(e)very case where the percentage of variance exceeded ten per cent, held the congressional redistricting unconstitutional, except *Grills v. Branigan*, S. D. Ind. (1966), 255 F. Supp. 155, and that case was reversed and remanded by the Supreme Court." (p. d7).

The ratio of equality between Districts 12 and 14 of 1.43 to 1 is more than twice the acceptable ratio in any case.

The average percent (%) of variance of all districts in Ohio is 7.71%. The North Carolina districting plan showing an average variation of 3.46%, less than one-half that in Ohio, was held to be unconstitutional. *Drum v. Seawell, supra.* In Texas, with 23 congressional districts, the average per cent of deviation was 5.5%, and, the court said, that any greater variance would be "condemned." *Bush v. Martin, supra* at 513.

The taint of arbitrariness, irrationality and discrimination is clearly evidenced in those Ohio districts in which county boundary lines have been ignored: Districts 11,

14, 16 and 19 with variances of +8.0%, +13.2%, +7.4% and +7.7%, respectively. Wide variances also exist in many districts in which the large municipalities have been haphazardly allocated to districts. Districts 3, 12 and 15 with variances of +8.7%, —20.9% and —13.0%, respectively, are examples. In *Drum v. Seawell, supra*, the court not only considered the population figures, but also the nature of the district boundary lines into which the population was distributed. It said:

> "The tortuous lines which delineate the boundaries of many of the congressional districts under the proposed plan, the resulting lack of compactness and contiguity, and the failure to achieve equal representation for equal numbers of people as nearly as practicable compels us to hold that the congressional apportionment is constitutionally invalid." (*Id.* at 925.)

See also, *Jones v. Falcey, supra*. The majority opinion did not take note of district boundary lines in Ohio.

The legislature elected to carve up Summit County to add population to an over-populated District 11 (+8.0%), but ignored neighboring District 13 (—1.6%).

District 12 (—20.9%), the smallest district in Ohio, is wholly contained within Franklin County. Yet Delaware County with a population of 36,107, contiguous to Franklin County, was placed in the eight county District 8.

The population in every district in Northeast Ohio (Districts 11, 14, 16, 17, 18 and 19) exceeds the average, ranging from +1.6% to +13.2%. Representative Kurfess stated the legislative committees had information that District 11 (+8.0%) contained counties that constitute some of the fastest growing areas in the State of Ohio. (Tr. 64)

Representative Kurfess claimed that the legislature started the districting process in the "Montgomery-Butler County area" (Tr. 68). The very first district it created (District 3) had a population of 35,005 greater than the average district, and a population of 119,470 greater than District 12, the other critical area of the state. (Tr. 68) District 24, a new district, adjoining District 3 and containing part of Montgomery County, ended up with a population of only 384,927, or 54,511 less than District 3; yet the legislature zig-zagged through the municipalities in Montgomery County. See map on page 9 of Appellants' Exhibit No. 2.

The Criteria Upon Which the Ohio Congressional Districting Plan Is Allegedly Based Are Invalid.

In *Swann v. Adams, supra,* the Court reversed the judgment entered by the District Court for the reason that the state failed to "present or the District Court to articulate acceptable reasons for the variations among the populations of the various legislative districts with respect to both the Senate and House of Representatives." ____ U. S. ____, 35 U. S. L. Week 4104 (U. S. Jan. 10, 1967). The Supreme Court further stated:

> "* * * None of our cases suggests that the differences of this magnitude will be approved without a satisfactory explanation grounded on acceptable state policy. On the contrary, the *Reynolds* opinion limited the allowable deviations to those minor variations which 'are based on legitimate considerations incident to the effectuation of a rational state policy.' 377 U. S. 533, 579. Thus that opinion went on to indicate that variations from a pure population standard might be justified by such state policy considerations as the integrity of political subdivisions, the maintenance of compactness and contiguity in legislative districts

on the recognition of natural or historical boundary lines. Likewise, in *Roman v. Sincock*, 377 U. S. 695, 710, the Court stated that the Constitution permits 'such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.'" (*Ibid.*)

The Report of the (Joint) Committee to Study Congressional Redistricting (Joint Exhibit No. 2), recommended four "criteria" to be used by the General Assembly "as guidelines in drawing new congressional districts in Ohio." Appellants challenged these criteria on two grounds. First, these criteria are without merit or legal basis, and each has been rejected by the federal and state courts when offered by the defendants therein. Second, the legislature did not honestly and faithfully adhere to the standards the Study Committee had recommended. For the most part, as the documents, and testimony of Representative Kurfess, demonstrated, these criteria were ignored. (Tr. 42-70)

The majority opinion did not examine whether there was sufficient legal basis for the criteria, nor whether these criteria were "based on legitimate considerations incident to the effectuation of a rational state policy." *Reynolds v. Sims, supra* at 579. It approved the standards, and incorporated them by reference to the testimony of Representative Kurfess, and concluded that, "(t)he other evidence presented in this case is convincing that these criteria were in fact followed in good faith", without analysis or any reference to what was the "other evidence." (pp. 20-21)

The first criterion contained in the Committee Report was as follows: "That, in meeting the court's admonition to equalize population among congressional districts, the population of each district be within 15% of the average

district size of the state." Representative Kurfess testified that this figure of 15% was derived from the so-called Celler Bill (H. R. 5505) then pending in Congress. Appellees' Exhibit I. Appellants call to the attention of the Court that H. R. 5505 was not approved by the United States Senate, is not the law of the land, and note that H. R. 5505 was approved by the congressmen who were the beneficiaries of a malapportioned House of Representatives.

Appellants raised the question of the source of this magical number of 15%? Congressman Celler, sponsor of H. R. 5505 and Chairman of the Judiciary Committee, said,

> "When the bill was originally offered, it was 10 percent above and below. It was then advanced to 12½ percent. Some of the members of the Judiciary Committee wanted it 20 percent. The members felt that was too large a spread, and there was a compromise, and the compromise was at 15 percent." (Appellees' Exhibit H, p. 4944)

Appellants do not believe that their constitutional rights may or should be compromised by legislative acts.

Appellants note that the Study Committee did not adopt and incorporate in its criteria the other principal standard contained in H. R. 5505; namely, that there must be "compactness" in the districts. Congressman Celler, in defining this term, said,

> "What is meant by 'compactness'? I believe compactness is well described in the report, which says as follows:
>
> By compactness, the committee means, with respect to any congressional district, the absence of the conditions and purposes underlying the following dictionary definition of 'Gerrymander': 1) To divide (a territorial unit) into election districts in an un-

natural and unfair way with the purpose of giving one political party an electoral majority in a large number of districts while concentrating the voting strength of the opposition in as few districts as possible.

2) To divide (an area) into political units in an unnatural and unfair way with the purpose of giving special advantages to the one group." (Appellees' Exhibit H, p. 4944)

This standard of compactness, said Congressman Celler, was of equal importance with the standard of population equality. *Id.* at 4952. The majority opinion recognized that "compactness and contiguity of the territory to be included in a congressional district are proper factors for consideration in drawing physical boundaries" (p. 16); but made no finding that such compactness and contiguity of territory was observed in the formation of districts in Ohio. To the contrary, compactness and contiguity are noticeably absent. See Appellants' Exhibit 2, pp. 3, 4, 5, 6, 7, 8, 9, where the boundary lines of Districts 1, 2, 11, 12, 14, 15, 19, 20, 21, 22 and 23 are set out in detail.

In the current session of Congress, legislation affecting congressional districting has been considered by both the House of Representatives and Senate. H. R. 2508, as approved by the House of Representatives on April 27, 1967, would allow a deviation between districts so that "the district with the largest population so established shall not exceed by more than 30 per centum the district with the smallest population in the number of persons." 113 Cong. Rec., H. 4770 (daily ed., April 27, 1967). This bill was amended in the Senate on June 8, 1967, to allow a variance of only 10% between the population of the largest and smallest districts. 113 Cong. Rec., S. 7872 (daily ed., June 8, 1967). Both the House and Senate versions also

contained language which established a standard of compactness. When the Senate did not concur in the House version of H. R. 2508, the bill was sent to a conference. 113 Cong. Rec., S. 7873 (daily ed., June 8, 1967). The latest published report at the time of writing of this brief indicated deadlock among the conferees.

There is no statute enacted by Congress, and signed by the President, against which to measure the Ohio congressional districts. Therefore, it is not necessary to discuss or analyze, at this time, whether a congressionally stated maximum per cent of variance or deviation is merely "permissive" or "absolute," and if the latter, whether consistent with the principle of "equality of population between districts" as required by the Constitution. See Debates in House of Representatives 113 Cong. Rec., H. 4759-4760 (daily ed., June 27, 1967). Suffice it to say at this juncture, that the per cent of variance of population between the largest and smallest congressional districts in Ohio falls outside the maxium amount established in either the House or Senate version of H. B. 2508.

In evaluating this arbitrary figure of 15%, the significant factor is that the courts which have reviewed congressional districting plans have not accepted such standard. A policy of the Missouri General Assembly to "stay within an arbitrary figure of 10 per cent above and below the mean," was rejected by the court as a valid standard. *Preisler v. Secretary of State,* 257 F. Supp. 953, 967. See also *Bush v. Martin, supra* at 513. An arbitrary figure such as this creates a "wholly false standard," said the court in *Calkins v. Hare, supra* at 828. The court further stated,

> "Nor is it the answer to a charge that only 10,000 people are deprived of their right to vote, this being but a small percentage of the entire voting population.

These 10,000 have a right to vote equally with others no matter what percentage of the total they comprise." (*Ibid.*)

The second criterion recommended by the Study Committee to the Ohio General Assembly was that "the 1960 federal Decennial Census be used as the basic source for population data, with consideration given to estimates of 1964 population in order to reflect the rate of population increase or decrease in various parts of the State. * * *"

This criterion has been emphatically rejected by the courts, because of the vagueness and uncertainty involved in such speculative ventures. In the case of *Maryland Citizens Comm. for Fair Cong. Redist. v. Tawes, supra,* the court said,

"A difficulty encountered by anyone who undertakes in 1966 to draw district lines with a view to achieving substantial population equality, is that the only accurate figures available are those from the 1960 census. The dilemma presents two possible choices: to accept the 1960 census figures which are not up to date, or to attempt to make estimates of changes in population figures since that date. Neither choice is a happy one, but we have concluded that it is better to adhere to the census figures than to engage in speculative estimates or projections which vary widely with the estimators and manner in which they handle the figures available to them from various sources. The alternative we have rejected would indeed lead into a mathematical thicket." (253 F. Supp. 731, 734)

In the Michigan case of *Calkins v. Hare, supra,* the court said,

"He states, without documentation or proof of any kind, that the Legislature took into account population trends in creating certain districts, and asks if the

> Legislature were not 'entitled to anticipate a further drop' in the population of some districts and further growth in others. The difficulty with the argument made is that it is totally devoid of any tie to reality of the case at bar. * * * We do not intimate that population trends either are or are not significant and usable, but the difficulty in respect of their use is that a basic constitutional right may be lost to a speculative future event, an unequal trade at best and at worst a cynical deprivation. The proof of a 'trend' must be compelling, immediate, and inescapable to justify disfranchisement." (228 F. Supp. 824, 827-828)

See also *Klahr v. Goddard, supra* at 540. Judge Celebrezze, in his dissent, correctly analyzed the relevancy of population trends. He stated, "(w)hile the majority is correct in saying that we must accept as true the facts of uneven population growth and population shifting among the 24 Ohio districts, there has been no showing how these population shifts have occurred in all the congessional districts. If the projected population growth estimates are not statistically reliable, then we must return to the basic disparity of total variance of 34.1%. This variance cannot be constitutionally justified."

Only in Kansas, where an annual state-wide census is required by state law, did the court accept population figures other than those based upon the 1960 census. *Meeks v. Avery, supra.*

Appellants recognize that the use of the federal decennial census is not constitutionally required. *Meeks v. Avery, supra; Burns v. Richardson,* 384 U. S. 73, 97 (1966). However, the questions in this case of the use of population figures other than those obtained in the 1960 Federal Census, and of the use of population trends in constructing congressional districts, are wholly different from the issue before the Court in *Burns v. Richardson, supra.*

In that case the question was whether the legislature could use state-wide figures derived from voter registration data in place of population in apportioning state senators for the 1966 election.

Contrary to the opinions in *Maryland Citizens Comm. for Fair Cong. Redist. v. Tawes, supra,* and *Calkins v. Hare, supra,* the majority opinion approved of the legislature's effort "to project population trends" (p. 11). The court concluded that basic population data of the 1960 federal census was properly "augmented by more recent information and estimates supplied in general by the Ohio Department of Development, by the Citizens League for Cuyahoga County specifically, and the Columbus Area Chamber of Commerce research staff in the case of Franklin County." (pp. 11-12) This conclusion of the Court was *not* based upon documentary evidence showing the actual data upon which the Study Committee, and the General Assembly, relied because no such evidence was introduced by appellees, but upon the "recollections" of Representative Kurfess. His testimony on cross examination by Mr. Lehman, appellants' attorney, was as follows:

> "Q. What was the source of your population figures that were considered by the Study Committee?
>
> A. Primarily the departments of the State of Ohio, and as presented to us by—I forget the gentleman's name who headed up this research staff as to population—
>
> Q. And do you have any of the material or figures which your Committee considered here with you today?
>
> A. No, I don't.
>
> Q. Can you tell us whether these figures were based upon the 1960 census?
>
> A. Excuse me. I think I might have misunderstood your previous question. We, of course, started with the 1960 census figures. This we had.

Q. For what? The 1960 census for what?

A. For the State of Ohio by county, and they are broken down also by subdivisions. Then the estimated figures that I referred to earlier for 1964 were provided generally, I think, by the Department of Development, however they were provided. *I think* with regard to Cuyahoga County it was by the Citizens League. In Franklin County, *I think* they came from Representative Wylie, a member of the Legislature from Franklin County, and *I think* they were provided him by the Chairman of the Chamber of Commerce's Research Staff.

Q. What was the source of these figures that were presented to you estimating the 1964 population? By "source," I do not mean who presented it. *What was the basis for their figures?*

A. *I very honestly could not detail that to you specifically.*

Q. Would it appear in the summary or any of the documents that we have here as exhibits?

A. Again, to the best of my knowledge, no. The Department of Development, the head of that particular area, a Ph.D. whose name leaves me at the moment, did testify lengthily at one of our original sessions with regard to how they arrived at these 1964 estimated figures, but I couldn't—I am a little out of my field at this point. I couldn't go into detail as to what all they took into consideration.

Q. Were there any census figures based upon taking of a census by a Federal or state agency at any time subsequent to 1960 submitted to your Committee?

A. Not to the best of my recollection, no." (Tr. 43-45) (Emphasis supplied.)

The 1960 population census is the only valid criteria against which to measure the constitutional validity of the Ohio congressional districts. If current census figures and

population trends are to be considered, "reliable and convincing data must be used, *and must be applied to all districts.*" (Emphasis supplied.) Dissent of Judge Celebrezze. (d2) The testimony of John F. Mackin, Appellees' second witness, has no meaningful value in this case. Mr. Mackin's testimony offered the approximate population of two of 24 districts on July 1, 1966. As Judge Celebrezze correctly noted, "(e)quivalent data was not introduced in respect of twenty-two of the twenty-four districts." (d2)

According to Mackin's testimony, the population of District 15 increased from 351,760 in 1960 to 439,678 on July 1, 1966, almost 90,000 people. (Tr. 86) What do we measure this population against? Has the population of District 11 (+8.0%), one of the faster growing areas in the state, also grown by 90,000 or more, so that it exceeds the average size district in 1966 by more than 20%? Has District 5 (—12.3%), a western district with a population of 354,129 in 1960, continued to lose population so that in 1966 it varies from the average district by more than 20%? Is the same not true for District 10? Is District 9, (+13.0%) Lucas County, now the largest district in the state? The majority opinion acknowledged that such data was not available. (p. 12)

The legislature did not even have the benefit of Mr. Mackin's data for 1964. (Tr. 107-108) The Appellees did not offer or introduce any statistics or data from which the General Assembly concluded that there were clear population trends in 1964. The record contains no explanation for the population deviations. There is no presumption that adequate reasons exist. *Jones v. Falcey, supra; Calkins v. Hare, supra.* Any conclusions as to population trends in Ohio in 1964 or 1966 would be pure speculation.

In this respect the majority opinion first concurs, then concludes the opposite. On p. 12 of the opinion the Court states, "* * * it may not be said that the overall redistricting is based upon such a degree of statistical stability and accuracy that the proof of correctness of the legislative intuition in two specific instances demonstrates the validity of the entire plan." Yet, on page 21, the court then stated, "(r)ecognizing the population trend *now judicially noticed by this Court* * * *. The General Assembly entered the mathematical thicket feared by the courts in accomplishing mid-decade redistricting." (Emphasis supplied.) Again, there is not a scintilla of evidence in this record to demonstrate population trends in any area in Ohio during any period after 1960, except Franklin County in July, 1966.

A third criterion recommended to the Ohio General Assembly was that "to the extent practicable, the residence of incumbent Congressmen and Congresswomen-elect be taken into consideration." This criterion has not been accepted by the courts in congressional districting cases as rational state policy. The Supreme Court of New Jersey said, "we repeat that the Constitution does not protect incumbents, leaving the review of such action to the electorate alone." *Jones v. Falcey, supra* at 108. A motive to retain incumbent congressmen, said the court in the *Drum* case, "may not predominate over the requirements of practical equality." 250 F. Supp. 922, 925. The Record is devoid of any evidence that this criterion was or was not followed by the General Assembly. The majority opinion acknowledges that this standard has not been "judicially established," but then gives such criteria weight by considering it as an aspect of "practicality." (p. 16) The majority opinion, contrary to accepted legal principle, approved not only of legislative recognition of

residency of congressmen, it also sought to throw an umbrella of protection over incumbency itself. (p. 22)

The fourth criterion recommended to the Ohio General Assembly by its Study Committee was that, "* * * where feasible the boundary lines of local units of government and present congressional districts be followed." Of the criteria promulgated by the Study Committee the first portion of the fourth standard is the only one judicially recognized as consistent with rational state policy. *Swann v. Adams, supra.*

The New Jersey Supreme Court has acknowledged that a "limited" deviation is acceptable "if it is needed to stay within the lines of existing political subdivisions and thus to avoid the spectre of party gerrymandering." *Jones v. Falcey, supra,* at 107. However, if the lines of political subdivisions are ignored, it continues, "there is no apparent reason for not achieving mathematical equality, subject of course to inevitable de minimis variations." *Id.* at 108. However, the court later said; "(b)ut when the deviation obviously exceeds that needed to permit the use of the lines of political subdivisions, the deviation spells out unconstitutionality, and a court must so hold unless the records affirmatively reveal a tenable basis for the legislative action." *Id.* at 109. See also *People ex rel. Scott v. Kerner,* 33 Ill. 2d 460, 211 N. E. 2d 736, 737 (1965).

It is evident from an examination of the Ohio Congressional Districting Map that, wherever it suited their purposes, the General Assembly ignored county and municipal boundary lines. The greater variances exist in those districts where the legislature avoided county lines, or was allocating sections of large municipalities. See Districts 1, 2, 3, 11, 12, 14, 15, 16 and 19. Also, compare District 5 (—12.3%) and District 9 (+13.0%) where, al-

though contiguous, the legislature, in this instance, did not cut across the Lucas County boundary line. The majority opinion did not conclude otherwise, but merely justifies the statute by references to the "practicability" of the situation, and the "good faith effort" of the legislators (pp. 12-22).

The testimony of Representative Kurfess established that only two of the twenty-four congressional districts remained intact, and that seventy-eight of the eighty-eight counties in Ohio were aligned in new congressional districts. (Tr. 56) The General Assembly certainly did not follow the latter part of the fourth criterion.

CONCLUSION.

As is evident from the transcript in this case and the foregoing brief, the question presented by this appeal is substantial.

There is not equality of population among congressional districts in Ohio.

The record does not evidence any legitimate considerations incident to the effectuation of a rational state policy which justify the gross disparity of population between congressional districts in Ohio.

The tortuous boundary lines and the lack of compactness and contiguity of the congressional districts in Ohio reflect the arbitrariness, irrationality and discrimination resulting from Section 3521.01 Ohio Revised Code.

The majority opinion of the trial court is not consistent with the interpretation of Article I, Section 2 of the Constitution of the United States as that section has been interpreted by the Supreme Court in *Wesberry v. Sanders, supra, Reynolds v. Sims, supra, Swann v. Adams, supra, Duddleston v. Grills, supra,* and *Kirkpatrick v. Preisler, supra,* and is in direct conflict with

each and every of the congressional districting cases decided in other state courts and federal district courts.

Accordingly, the order of the trial court should be reversed, and this case should be remanded with instructions to the trial court to forthwith order the redistricting of the Ohio Congressional Districts by the Ohio General Assembly in accordance with Article I, Section 2 of the United States Constitution.

Respectfully submitted,

HARRY J. LEHMAN,
LOUIS STOKES,
JACK G. DAY,
RUSSELL T. ADRINE,
RICHARD GUNN,
ALBERT R. GAMBLE,
KENNETH G. WEINBERG,
Counsel for Appellants.

CERTIFICATE OF SERVICE.

The undersigned, attorney for Appellants, herewith certifies that on the first day of September, 1967, he served copies of the foregoing Jurisdictional Statement on each of the parties to this suit, by mailing a copy by U. S. mail, postage prepaid, to their attorneys of record, William Saxbe, Attorney General of the State of Ohio, and William D. Van Tilburg, 124 Church Street, Ashland, Ohio.

HARRY J. LEHMAN.

APPENDIX A.

MEMORANDUM ON COMPLAINT SEEKING INJUNCTIVE RELIEF AND DECLARATORY JUDGMENT.

Before: CELEBREZZE, *Circuit Judge*, CONNELL; *Chief District Judge* and KALBFLEISCH, *District Judge*.

CONNELL, *Ch. J.*

(1) On December 17, 1964, the General Assembly of the State of Ohio passed Amended Substitute House Bill No. 18, wherein it was enacted that Section 3521.01 of the Revised Code be amended "relative to apportionment [sic] of Congressional districts." The bill was approved on December 29, 1964, and on the same date was filed with the Secretary of State. The provisions of amended Section 3521.01 of the Revised Code became effective March 29, 1965.

On May 11, 1965, plaintiffs, residents, citizens and registered qualified voters of the State of Ohio, filed a complaint in the United States District Court for the Eastern Division of the Northern District of Ohio, charging that the description and classification of the Congressional districts as provided by Ohio Revised Code Section 3521.01, as amended, are arbitrary, capricious, unreasonable and invidiously discriminatory. Plaintiffs further charged that the (2) classification is unfavorable to the plaintiffs and others similarly situated, placing them in a position of inequality without constitutional justification in relationship to those voters in those districts favored by the classification.

Plaintiffs further asserted that the provisions in the accused statute are arbitrary, capricious, unreasonable and invidiously discriminatory in that they deprive them and others similarly situated of rights under the Equal Protection Clause of the Fourteenth Amendment, Sections 1 and 2, and Section 4 of Article IV of the Constitution.

Plaintiffs further contended that Ohio Revised Code Section 3521.01, as amended, directly violates Article I, Section 2 of the Constitution of the United States.

Plaintiffs sought a trial to a three-judge Court, as prescribed in Title 28 U. S. C., Sections 2281 and 2284, and that such three-judge Court hold and decree that "the congressional apportionment for the State of Ohio under Ohio Revised Code § 3521.01, as amended, will deprive the plaintiffs:

(a) of liberty and property without due process of law;

(b) of the equal protection of the laws;

(c) of privileges and immunities guaranteed by the Fourteenth Amendment to the Constitution of the United States";

Plaintiffs further sought a declaration that Ohio Revised Code Section 3521.01, as amended, is void and invalid, as being contrary to Article I, Section 2 of the Constitution of the United States; that defendant James A. Rhodes, as Governor of Ohio, be enjoined from signing the certificates of election; and that defendant Ted W. Brown be enjoined from furnishing any forms for nomination and/or elections to membership in the House of Representatives of the United States Congress and from furnishing any local (3) board or boards of election forms of the official ballots, tally sheets, etc., to be used in elections, and that he be further enjoined from issuing certificates of election or forwarding said certificates to the Clerk of the House of Representatives in Washington, D. C., in accord with Ohio Revised Code Section 3521.01, as amended, and Section 3505.38.

Plaintiffs further sought a mandatory injunction directing defendants Rhodes and Brown to declare, prepare for and hold the election for members to the House of

Representatives of the United States Congress on a state-at-large basis if the General Assembly failed to take action to redistrict the State of Ohio upon an equitable and representative basis providing for the protection of the plaintiffs' constitutional rights.

The defendants moved to strike the complaint on June 7, 1965; and on July 20, 1965, the defendants' motion to strike was overruled. On September 15, 1965, defendants filed their answer admitting that plaintiffs are residents, citizens and registered qualified voters of the State of Ohio and that this Court has jurisdiction of the parties and of the subject matter of this complaint under Title 42 U. S. C., Sections 1983 and 1988, and Title 28 U. S. C., Section 1343(3). Defendants specifically denied each and every other allegation contained in the complaint.

The order designating the three-judge Court was filed on January 28, 1966. Although there was no request, the case was assigned for trial for September 27, 1966, and upon the request of the plaintiffs was continued until November 9, 1966, the day following the election of congressmen.

This cause came on for trial on November 9, 1966. In his opening statement Mr. Lehman, attorney for plaintiffs, made the following declaration:

> (4) "Mr. Lehman: * * * I should first like to make two or three general introductory remarks because this hearing happens to fall on the day after the 1966 Congressional elections.
>
> Judge Celebrezze: You are aware that the case was passed on the request of the Plaintiffs?
>
> Mr. Lehman: I am aware of that, sir. It is not the intent or the desire of the Plaintiff to ask the Court to set aside the election that was just held, although the language of the petition and the complaint sets this forth.

The evidence to be introduced by the Plaintiff here this morning consists of two parts. Firstly, there are two documents which counsel for the Defendants and Plaintiffs have agreed may be stipulated; and second, a series of other documents which we have reviewed with counsel for the Defendants and which they agree to permit the Plaintiffs to introduce without objection.

There will be no oral testimony on behalf of the Plaintiffs.

I also briefly outline to the Court—although this, of course, will be covered in fullest and greatest detail in the brief that we will submit—that we are limiting the nature of the complaint that has been filed to the rights, the Constitutional rights, that arise under Article I, Section 2 of the United States Constitution, as will appear from the evidence that is offered and introduced on behalf of the Plaintiffs.

There will be no evidence introduced on claims arising under the Fourteenth Amendment as is set out in the complaint.

We believe that the issue, the Constitutional issue, raised by the documents and the evidence under Article I, Section 2, of the Federal Constitution, creates an issue which is clear, which is precise, and which the Court can face squarely.

We are talking, of course, about the right that is defined in the Supreme Court case, the fundamental landmark case, Wesberry vs. Sanders, in which the court has said that the obligation, dictates and direction of Article I, Section 2, of the Federal Constitution is that, 'The plain objective of the Constitution is to make equal representation for equal numbers of people the fundamental goal of the House of Representatives.' That is a quote from the Opinion." (Tr. 5, 6, 7.)

(5) Mr. Lehman reaffirmed plaintiffs' contentions, beginning at page 21 of the transcript wherein the following appears:

"Judge Celebrezze: May I ask a question, Mr. Lehman, so the Court is clear as to what your intentions are. The Court understands that you are proceeding strictly on the basis of Article I, Section 2, not on the Fourteenth Amendment? In your complaint there were two actions. One was that the district was mal-apportioned and the other was that it eluded the influence of certain ethnic groups. Are you now abandoning that?

Mr. Lehman: Yes, we are, your Honor.

Judge Celebrezze: You are proceeding strictly on the question of mal-apportionment?

Mr. Lehman: That is correct. We are also abandoning, although it is stated in the petition, the claim of gerrymandering because we do not believe, as our brief states, that the Court has the tools to deal with this type of problem.

Judge Celebrezze: You are not contending that the Legislature gerrymandered in setting up these districts? Is that what you are saying?

Mr. Lehman: Not precisely. We are not presenting that issue to the Court." (Tr. 21, 22.)

The issues in this case are clearly defined by the statement of Mr. Van Tilburg, attorney for defendants, beginning at page 22 of the transcript, as follows:

"Judge Celebrezze: Is the Defendant ready?

Mr. Van Tilburg: We are, your Honor. I would like to make a brief opening statement, if I might, to outline to the Court the position of the Defendants. I agree wholeheartedly with Mr. Lehman, for the Plaintiffs, that the sole issue before this Court is whether the present Congressional districts of the State of Ohio, which were passed and designed by the Legislature in 1964, in special session, subsequent to the Federal decision of Wesberry vs. Sanders, comply with the requirements of Wesberry vs. Sanders that the population of Congressional districts within a state be as nearly equal as is practical.

(6) The position of the state is that when this Districting Act was passed it met the requirements of the Federal Constitution under Article I, Section 2, and that it still meets those requirements.

There has been some talk about population deviation, and if I might I would like to explain one method which was used, and that will be used in our testimony, and that is used in some of the exhibits, for measuring this population discrepancy."

The Court finds that this action was brought pursuant to Title 42 U. S. C., Sections 1983 and 1988, and that this Court has jurisdiction of the subject matter under Title 28 U. S. C., Section 1343(3).

Upon trial, plaintiffs withdrew all averments of the complaint relating to charges that Ohio Revised Code Section 3521.01, as amended, violates the Fourteenth Amendment and submitted the case to the Court upon the sole question of whether Ohio Revised Code Section 3521.01, as amended, directly violates Article I, Section 2 of the Constitution of the United States. The Court finds that plaintiffs have standing to raise this issue, that defendants are proper parties, and that the Court has jurisdiction of the parties.

In its consideration of this question, the Court is guided by an imprecise standard. In *Wesberry v. Sanders*, 376 U. S. 1, 7-8 (1964), the Supreme Court of the United States held that "construed in its historical context, the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." This Court must determine whether or not the Ohio redistricting plan (Ohio Revised Code, Section 3521.01, as amended) is in conformity with this mandate.

In support of their respective positions, the parties hereto have used numerous tests for equality suggested in prior congressional redistricting and legislative apportionment cases. The population ratio between the largest and the smallest districts is (7) obtained by dividing the population of the largest district into the population of the smallest district, thus expressing the number of persons represented by the congressman elected by the voters of the larger district compared to the number of persons represented by the congressman elected by the voters of the smaller district. The population of any given district may be compared to that of the other districts of the state in terms of variance from the average or ideal district obtained by dividing the population of the entire state by the number of congressmen to be elected from the state. The population of the ideal or perfect district is then compared to that of any given district and the comparison is expressed in terms of percentage of variation of that given district above or below the population of the ideal or perfect district. In this latter manner, comparison of the total population of any given district may also be expressed in total population numbers to demonstrate total population of any district greater or smaller than that of the ideal district. For purposes of this opinion, the three foregoing tests will suffice, although the Court has been apprised of other comparisons that might be made.

At the trial, both the plaintiffs and the defendants introduced exhibits and the defendants called two witnesses who were examined and cross-examined at length. Counsel for the parties submitted briefs in lieu of oral argument. To make out a prima facie case of unconstitutionality of the redistricting statute in question, plaintiffs relied upon census and statistical data which, using the

evidence most favorable to the plaintiffs' case, reveal that based upon data prepared by the Bureau of the Census in 1966 using boundaries of the 24 districts as drawn by the Ohio Legislature and superposing unaided 1960 federal census figures, a population disparity of 137,806 persons exists between the smallest congressional district (8) which contains 319,968 inhabitants and the largest congressional district which contains 457,774 residents. (Pltfs. Ex. 2, p. 16.) Applying the other tests to these data, it may be determined that the ratio between the smallest and the largest districts is 1.430 to 1, and that the extreme variances above and below ideal are +13.2% in the largest district and —20.9% in the smallest district. Plaintiffs' evidence further shows that the numbers of population attributed to nine districts as finally drawn in Amended Substitute House Bill No. 18 differ from those assigned to the same districts by the Bureau of the Census, resulting in a different variation from ideal. (Pltfs. Ex. 1.) Table I, below, in which a juxtaposition of both population estimates has been effected, reveals that a disproportionate population distribution exists regardless of the allocation used. For example, District 12, the smallest district, varies according to Amended Substitute House Bill No. 18, by —18.1% below ideal, representing 126,572 fewer persons than are contained in the largest district, District 14. This difference in allocation apparently reflects different judgment by the individuals estimating the population included within the district boundaries as drawn and is not critical to decision of this case. Plaintiffs' showing a disparity in excess of 100,000 population between the largest and the smallest districts as established by Amended Substitute House Bill No. 18 is sufficient showing of unconstitutionality of that redistricting plan to

shift the burden to defendants to come forward with evidence of acceptable reasons in explanation of such inequality.

In *Kilgarlin v. Martin*, 252 F. Supp. 404 (S. D. Tex., 1966), the principal opinion rested heavily upon the burden of proof to be sustained by a plaintiff attacking an apportionment plan. The withholding of decision by the Court in the instant case while considering the matter of the burden of proof has been rewarded by recent publication of the United States Supreme Court's order upon (9) appeal of the *Kilgarlin* case, reported as *Kilgarlin v. Hill*, 35 U. S. L. W. 3293 (February 20, 1967). That order clarifies the matter of which party must sustain what burden. There can no longer be any doubt that a showing by the plaintiff that substantial inequality of numbers exists in a plan apportioning population among the several districts within a state is sufficient to invalidate such a plan "unless satisfactorily justified by the court or by the evidence of record."

In *Kilgarlin v. Hill*, the Supreme Court rejected the holding of the district court that "appellants [plaintiffs in the district court] had the burden not only of demonstrating the degree of variance from the equality principle but also of '*negat*[*ing*]' the existence of any state of facts which would sustain the constitutionality of the legislation.'" (Emphasis added.) This, the district court had held, plaintiffs there had not done.

It is significant that *Kilgarlin* was an apportionment case in which a greater degree of flexibility is permissible in making allowance for seeming inequality than is permissible in a districting case. (See *Reynolds v. Sims*, 377 U. S. 533, 578 (1964).) There is a striking similarity of the type of proof offered by plaintiffs in *Kilgarlin* and the

proof offered by plaintiffs in the case to be decided here. The following is from the Supreme Court's order:

> "Appellants' proof showed that in these other districts the population per representative varies from 54,385 to 71,301, or from 14.84% over-represented to 11.64% under-represented. The ratio between the largest and the smallest district is thus 1.31 to 1. The deviation from the average population per representative is greater than 10% in 12 single-member districts, and a total of 55 representatives would be elected from eight multi-member districts in which the population per representative varies from the ideal by more than 6%."

(10) The conclusion is inescapable that in the congressional districting case before this Court the population inequality shown by plaintiffs requires justification by defendants.

In justification of Ohio Revised Code Section 3521.01, as amended, the defendants contend that a plan of congressional districts having a maximum deviation of approximately 15% above and 15% below the population of the average, ideal or perfect district is within the equal-population requirement. Further, the defendants contend that the Court may consider current population statistics in judging the validity of that plan. Current population estimates offered by the defendants, if accepted, would bring all 24 Ohio districts within 15% variation above or below the hypothetical ideal.

The defendants' argument presents two important issues. The approval of the use of a plan based upon 15% variance above and below the average or ideal district is critical to a holding of constitutionality. The acceptance of the current population estimates offered is essential to the defendants' achievement of that 15% maximum deviation.

Use of the federal decennial census, although that medium has been used in most congressional redistricting and legislative reapportionment plans, is not constitutionally required. *Burns v. Richardson*, 384 U. S. 73, 97 (1966); *Meeks v. Avery*, 251 F. Supp. 245, 250 (D. Kan. 1966). However, proffered population figures other than federal census figures have been rejected if their reliability has not been sufficiently demonstrated. In *Klahr v. Goddard*, 250 F. Supp. 537, 546 (D. Ariz. 1966), although the projected data offered was rejected as unreliable, the Court observed that "[i]f the 1964 population could be demonstrated with certainty, much could be said in favor of apportionment upon such basis." The United States District Court for Maryland undertook redistricting of that State following (11) failure of the Maryland Legislature to achieve an acceptable plan. *Maryland Citizens Committee for Fair Cong. Redist. v. Tawes*, 253 F. Supp. 731 (D. Md. 1966), aff'd. per curiam sub nom. *Alton v. Tawes*, 384 U. S. 315 (1966). At page 734 of the District Court's opinion Judge Sobeloff said:

> "A difficulty encountered by anyone who undertakes in 1966 to draw district lines with a view to achieving substantial population equality, is that the only accurate figures available are those from the 1960 census. The dilemma presents two possible choices: to accept the 1960 census figures which are not up to date, or to attempt to make estimates of changes in population figures since that date. Neither choice is a happy one, but we have concluded that it is better to adhere to the census figures than to engage in speculative estimates or projections which vary widely with the estimators and the manner in which they handle the figures available to them from various sources. The alternative we have rejected would indeed lead into a mathematical thicket. See *Klahr v. Goddard*, 250 F. Supp. 537 (D. Ariz. 1966)."

The use of accurate population data, current at the time or redistricting, is consistent with the equal population requirement, whether the redistricting is done immediately following a federal decennial census or in the interim years as is sought to be done here. However, if such data are to be acceptable, they must substantially approximate in stability and accuracy the data provided by the federal census. See *Burns v. Richardson, supra.*

In the 1964 special session of the Ohio Legislature, which drafted the redistricting plan here under scrutiny, that body relied upon statistics supplied by several agencies throughout the State of Ohio in order to project population trends likely to result in an equal redistricting by the time elections were to be held in 1966. It was thought that uneven population growth rates in certain areas of the state required that such considerations be given effect. The basic population data used were derived from the 1960 federal census, augmented by more recent information and estimates supplied (12) in general by the Ohio Department of Development, by The Citizens League for Cuyahoga County specifically, and by the Columbus Area Chamber of Commerce Research Staff in the case of Franklin County. (Tr. 44, 45.) No official federal census data of more recent vintage than 1960 was used. The evidence does not disclose that any information was supplied by any official state agency which might have conducted a statewide physical population census.

Defendants have offered current data to vindicate the 1966 projections as forecast by the Legislature in 1964 in respect to Districts 12 and 15. Equivalent data were not introduced and are apparently unavailable in respect to the remaining 22 districts which can now be evaluated only on the basis of the 1960 federal census. With due regard for the basic nature of the constitutional right as-

serted here, in view of the plurality of information sources relied upon by the Legislature in devising the plan attacked, it may not be said that the overall redistricting is based upon such a degree of statistical stability and accuracy that proof of correctness of the legislative intuition in two specific instances demonstrates the validity of the entire plan. The defendants' case in justification, however, does not fail upon this sole determination.

The constitutionally acceptable standard of equality is set forth in Article I, Section 2 of the Constitution of the United States, as that section has been interpreted by the Supreme Court of the United States in *Wesberry v. Sanders*. Therefore, in order that this Court may find Ohio Revised Code Section 3521.01, as amended, to be constitutionally sound, the result of the redistricting plan therein embodied must afford equality of one man's vote to another's "as nearly as is practicable."

The Supreme Court has established no precise definition of "practicability," but rather has left it to the District Courts to "work out more concrete and specific standards" on a case-by-case (13) basis. The decided cases make it clear, however, that practicability means that which the courts, rather than the parties, consider to be practicable under the circumstances, with a resultant weakening of the presumption of constitutionality of legislative acts insofar as those acts concern congressional redistricting. See, e.g., *Calkins v. Hare*, 228 F. Supp. 824, 827 (E. D. Mich., S. D., 1964); *Kilgarlin v. Hill*, 35 L. W. 3293 (February 20, 1967).

This Court, then, must consider the circumstances upon which the redistricting body has acted, and give proper weight to acceptable factors, if any, which may rationally justify population disparity between districts.

Although the actual population disparities between congressional districts in plans found to be constitutionally acceptable by courts sitting in other states have nothing to do with the precise issue before this Court, the rationale to be perceived in the decisions of courts in redistricting cases is of assistance in the reaching of a correct decision here. Certain underlying principles peculiar to redistricting cases are evident.

While the language used is similar to both congressional redistricting and legislative reapportionment cases; while there is frequent approving reference in such cases, one class to the other; and while the basic tenet of all is "equality of representation" as commanded by *Wesberry;* still, a fundamental difference remains in the source of the right to be protected in the separate classes of cases.

> "*Gray* and *Wesberry* are of course not dispositive of or directly controlling on our decision in these cases involving state legislative apportionment controversies. Admittedly, those decisions, in which we held that, in statewide and in congressional elections, one person's vote must be counted equally with those of all other voters in a State, were based on different constitutional considerations and were addressed to rather distinct problems. But neither are they wholly inapposite. *Gray,* though not determinative here since involving the weighing of (14) votes in statewide elections, established the basic principle of equality among voters within a State, and held that voters cannot be classified, constitutionally, on the basis of where they live, at least with respect to voting in statewide elections. And our decision in *Wesberry* was of course grounded on that language of the Constitution which prescribes that members of the Federal House of Representatives are to be chosen 'by the People,' while attacks on state legislative apportionment schemes, such as that involved in the instant cases, are princi-

pally based on the Equal Protection Clause of the Fourteenth Amendment. Nevertheless, *Wesberry* clearly established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State. Our problem, then, is to ascertain, in the instant cases, whether there are any constitutionally cognizable principles which would justify departures from the basic standard of equality among voters in the apportionment of seats in state legislatures." *Reynolds v. Sims*, 377 U. S. 533, 560 (1964).

The principal opinion in *Reynolds v. Sims*, a legislative apportionment case subsequent to *Wesberry*, relies in part upon precedent of congressional districting cases. That opinion, however, continues on page 578 to make clear a fundamental dissimilarity and concludes that:

"Somewhat more flexibility may be constitutionally permissible for state legislative apportionment than for congressional districting."

The plain inference to be drawn is that a more strict constitutional standard is demanded in congressional districting cases than is required in state legislative reapportionment cases. It may also be perceived that the teachings of apportionment cases are not entirely inapposite, for common principles are shared in regard to all matters save those extending the limits of flexibility to accommodate state interests applicable solely to Fourteenth Amendment considerations. See *Reynolds v. Sims, supra; Swann v. Adams*, 35 U. S. L. W. (January 10, 1967); *Kilgarlin v. Hill, supra.*

(15) The determinant factor in congressional districting is well established. "One factor and one alone is controlling, the factor of population." *Calkins v. Hare,*

228 F. Supp. 824, 829 (E. D. Mich., S. D., 1964). "One factor, and only one, may be taken into account in apportioning and establishing the congressional districts among the people of a state and that factor is population." *Meeks v. Anderson*, 229 F. Supp. 271, 273 (D. Kan., 1964). "Members of Congress are to be elected on the basis of population and nothing else." *Bush v. Martin*, 224 F. Supp. 499, 511 (D. Tex., 1963).

Nevertheless, dogmatic recitation of the "population only" precept will not suffice in the evalution of a districting plan as "practicable," for "practicablity" includes elements of reasonableness and feasibility. Such elements necessarily require consideration of that which is capable of being done or accomplished with available means and resources. "Practicability" does not mean that that degree of mathematical exactness must be achieved which includes all which is not impossible. Congressional districts need not be drawn with such a fine degree of mathematical precision. *Wesberry v. Sanders*, 376 U. S. 1, 18 (1964). To this end, the limits of "practicability" have been construed to include only *de minimis* deviations from exact equality. *Calkins v. Hare, supra, Preisler v. Secretary of State of Missouri*, 257 F. Supp. 953, 973, aff'd. sub nom. *Kirkpatrick v. Preisler*, 35 L. W. 3233 (January 10, 1967).

In applying the *de minimis* doctrine, the courts in both *Calkins* and *Preisler* refused to be drawn into a "numbers game" involving consideration of percentages of deviation above or below a hypothetical ideal district population. Both courts preferred to rest decision upon consideration of the extent to which raw population statistics for the various congressional districts departed from equality. Other courts receiving Supreme Court affirmance, while (16) considering percentage deviation, have achieved the same practical result by accepting as consti-

tutional only such percentages as represented minimal numbers of raw population. E.g., *Maryland Citizens Committee for Fair Cong. Redistricting v. Tawes, supra.*

Compactness and contiguity of the territory to be included in a congressional district are proper factors for consideration in drawing physical boundaries. Such considerations may not, however, predominate over practicable equality of the population to be included within such boundaries. *Drum v. Seawell,* 250 F. Supp. 922, 925 (N. D. N. Car., 1966). Likewise, those other considerations of geographical draftsmanship, such as the residence of sitting congressmen, although this latter matter has not been judicially established, may also be considered aspects of "practicability" so long as numerical population equality is not overridden by the result.

We state preliminarily that all recognize the futility of attempting to divide Ohio's population into 24 exactly equal districts. All recognize that the daily revision in population—by birth and death, by immigration and emigration—makes an ideal division the more impossible. The best obtainable result, the most practical result, will therefore have to suffice. That is all the law and the courts expect.

The Legislature of Ohio, in December of 1964, drew up this plan or congressional districts which purported to conform with the decision of the Supreme Court of the United States in *Wesberry v. Sanders,* 376 U. S. 1 (1964). The plan in this division followed by the Ohio Legislature and its committee was described in testimony by Mr. Charles F. Kurfess, who was Chairman of the Federal Relations and Elections Committee of the Ohio House of Representatives in 1964. Prior to the redistricting, Ohio had had 23 congressional districts and one at-large; the

new plan envisioned the creation of a new 24th district and the consequent reshaping of the other 23 districts.

(17) In 1960 Ohio's population was approximately 10 million, which, divided by its 24 districts, equals 416,666 per district. Obviously there is no possible way in which this State, with its 88 counties, its lake and river boundaries, its increasing city populations, its diverse industries attracting its workers from within and without the State, can be divided into 24 districts each of which shall hold exactly 416,666 people. Obviously, it is not possible to give every voter out of over a ten million population exactly the same weight of a vote by way of an ultimate result as is given to each and every other 10,000,000 voters. If each district could be changed daily, no result of perfect equality would ever be susceptible of attainment.

So it was incumbent on Ohio's Legislature to draw up a plan which would represent a good faith effort on its part to meet constitutional standards, and which would be practical, workable, and as fair as men could make it, in light of the available criteria suggested by United States Supreme Court decisions as of November 10, 1964.

The starting point for the legislators' consideration was the Supreme Court's opinion in *Wesberry v. Sanders*, 376 U. S. 1, 7 (1964), wherein it was held that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." The Supreme Court later recognized[1] that:

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[1] In this opinion we have interspersed our reference to legislative apportionment cases and congressional districting cases despite an implicit distinction by the Supreme Court per *obiter dicta* in *Reynolds v. Sims*, 377 U. S. 533, 577 (1964). A review of subsequent cases compels the view that the Court is applying the same test in both instances; the Court's actions speak louder than its *dicta*. In *Wesberry v. Sanders, supra*, the first congressional districting case, the Court stated the requirement

(18) "It is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable, constitutional requirement.' *Reynolds v. Sims,* 377 U. S. 533, 577 (1964).

While population is obviously a most important determinative factor, states are not required to draw legislative districts on a purely population basis:

> "A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. Valid considerations may underlie such aims. Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering." *Reynolds v. Sims, supra,* at pp. 578-9.

Permissible deviations in population ratio may be based upon these other State policy considerations so long as:

> "* * * under the particular circumstances existing in the individual State whose legislative apportionment

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(Continued from preceding page)

that "* * * as nearly as is practicable one man's vote in a congressional election is to be worth as much as another." 376 U. S. 7. In *Reynolds v. Sims,* the first apportionment case, the Court required "* * * the honest and good faith effort to construct districts * * * as nearly of equal population as is practicable * * *." 377 U. S. 577. The Supreme Court's order of January 9, 1967, in *Duddleston v. Grills,* stated: "The judgment is vacated and the case is remanded to the District Court for further consideration in light of *Swann v. Adams,* No. 136, October Term 1966, decided this day, *Wesberry v. Sanders,* 376 U. S. 1, and *Reynolds v. Sims,* 377 U. S. 533." *Grills* was a congressional case.

The citation in *Grills* (a districting case) to *Swann v. Adams* (an apportionment case), *Reynolds v. Sims* (apportionment case), and to *Wesberry v. Sanders* (the congressional districting case) indicates that the court is using the same criteria in congressional districting and legislative apportionment.

is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination." *Roman v. Sincock*, 377 U. S. 695, 710 (1964).

(19) It is interesting to note, in light of the criteria adopted by the Ohio legislators, that the Supreme Court has most recently stated that variations from the population norm may be justifiable:

"* * * by such state policy considerations as the integrity of political subdivisions, the maintenance of compactness and contiguity in legislative districts or the recognition of natural or historical boundary lines." *Swann v. Adams*, ____ U. S. ____, 35 U. S. Law Week, 4101, 4102 (1967).

Nowhere has the Supreme Court set a maximum allowable deviation from the population norm; in fact, we are forewarned that "what is marginally permissible in one State may be unsatisfactory in another, depending upon the particular circumstances of the case" (*Reynolds v. Sims*, 377 U. S. 553, 578), and further that "the fact that a 10% or 15% variation from the norm is approved in one State has little bearing on the validity of a similar variation in another State." (*Swann v. Adams, ibid.*) The Court carefully avoided an over-simplification of this complex problem when, in *Roman v. Sincock, supra*, it refused:

"* * * to state in mathematical language the constitutionally permissible bounds of discretion in deviating from apportionment according to population. In our view the problem does not lend itself to any such uniform formula, and it is neither practicable nor desirable to establish rigid mathematical standards * * *." (377 U. S., at 710).

Thus, the Supreme Court has refused to adopt and has wisely refrained from the absolutist approach that any measurable population deviation is per se unconstitutional.

There is apparently nothing here but a constitutional question which the plaintiffs seek to reduce to an arithmetical question, but which carries with it problems too complex for the slide rule and too elusive for the computer. The physical boundaries established are not the subject of charges of arbitrary action or invidious discrimination.

(20) Representative Charles F. Kurfess, called as a witness by defendants, was Chairman of the Federal Relations and Election Committee of the Ohio House of Representatives. On direct examination, Mr. Kurfess testified regarding criteria used in drafting Amended Substitute House Bill No. 18, the congressional redistricting bill. (Tr. 40, 41, 42.)

"Mr. Van Tilburg: Mr. Kurfess, I am asking you this question as in your capacity as Chairman of the Federal Elections, or Elections Committee: Did that Committee follow any standards in drafting the Congressional redistricting bill?

Mr. Kurfess: Yes. I would say that in our deliberations we followed the standards as suggested in this Committee, the report of the Study Committee.

Mr. Van Tilburg: What were the standards that you followed?

Mr. Kurfess: Geographically they were with regard to population, to establish as a maximum deviation, 15 per cent from the average, that in doing the redistricting that the 1960 Federal census population figures be used as the primary base, but that consideration be given to the estimated population figures which were available to the Committee for the population of the various counties and areas of the state

as estimated for 1964, and this in order to reflect the growth of various areas of the state to a greater degree than others.

Also the suggested standard that to the extent feasible existing lines of political subdivisions would be followed in drawing the districts; and finally, that the residence of sitting Congressmen be taken into consideration.

Mr. Van Tilburg: Mr. Kurfess, you mentioned a 15 per cent figure. How did you happen to arrive at that variance?

Mr. Kurfess: This was the recommendation of the Study Committee, and the Study Committee adopted that figure primarily because at that time none of the Federal Court decisions were setting forth any very particular criteria for us to follow, and with the staff reports and memoranda available to us we determined that about the best criteria to follow would be that as set forth in the so-called Celler Bill, which at that time was pending before the Congress, and established the 15 per cent deviation.

(21) Mr. Van Tilburg: No further questions."

The other evidence presented in this case is convincing that these criteria were in fact followed in good faith.

The evidence and the exhibits offered upon the trial of this case compel us to accept as true the facts of uneven population growth and population shifting among the 24 Ohio districts, as well as the total increase of the population of the state since 1960. We are not oblivious to the potential involuntary disfranchisement occasioned by the dislocation of settled voting districts and the resultant confusion of the electorate of Ohio sure to follow a succession of perennial changes in the state's districting. Concern for permissible stability in the exercise of the citizen's basic right compels caution in taking judicial action likely to achieve only substitution of allegedly ag-

grieved parties in a succession of districting lawsuits in behalf of dislocated electors which a 1967 redistricting will surely invite.

Following the pronouncement of *Wesberry* in 1964, without judicial compulsion, Ohio undertook effectuation of the constitutional mandate. Recognizing the population trend now judicially noticed by this Court, and in order to afford recognition to the present day population realities of the state it was sworn to administer, the General Assembly entered the mathematical thicket feared by the courts in accomplishing mid-decade redistricting. See *Maryland Citizens Committee for Fair Cong. Redist. v. Tawes,* quoted *supra,* page 11. Economy of judicial time is not of concern here on choosing a basis for population distribution as it was in *Maryland Citizens Committee,* for in Ohio, the legislature with its resources, not a federal court, undertook draftsmanship of properly reflective district boundaries.

No court has yet achieved a standard of "practicable" equality (22) which can, in the words of the dissenting Mr. Justice Harlan in *Wesberry,* "control the balance between keeping up with population shifts and having stable districts." Counsel for defendant states the dilemma succinctly:

> "An attempt to create new districts at this time with population variances of less than 15%, would be an exercise in futility. The population figures upon which that districting would be based are so out of date that the plan would result in no more equal representation than we have today and might well result in more unequal representation, even if it appeared equal on paper." (Defts. Br., p. 26).

An element of "practicality" is implicit in the concept of "practicability" as that term is to be applied in a dis-

tricting case. Mathematical exactitude must yield in that degree necessary to achieve the over-riding "one man, one vote" principle in a manner "as nearly as is practicable." The conclusion is inescapable that in determining the "practicability" of a given districting plan, a measure of academic precision must defer also to the practical realities of effectuating that constitutional command.

This case was commenced May 11, 1965, but upon motion of counsel for the plaintiffs was continued for trial until the day following the elections which were conducted on November 8, 1966 in accord with the redistricting plan now attacked. We do not choose to speculate as to the motives of counsel in that respect. We may not ignore the fact however that 24 Ohio representatives elected under the plan attacked are now serving in Congress, and that at present declaration of constitutional invalidity of their election districts may well have effects reaching far beyond the relief sought in this action.

We have determined that use of the 1960 federal census is not constitutionally demanded. Further, although the varied sources of population information used by the Ohio legislature may lack uniformity (23) of the federal census and the percentage deviation between selected Ohio districts may exceed that generally found acceptable in other states, we are unable to find that resort to the 1960 federal census in 1967 will achieve a population disparity of any lesser degree.

The agencies of the state of Ohio do not presently provide annual statewide census data. This Court is without power to compel the state legislature to enact legislation to conduct such a census, if indeed such an undertaking could be completed in time for the drafting of a new districting plan prior to the congressional elections to be held in 1968.

New and accurate census data will be available after the 1970 federal decennial census. It may well be that redistricting of the state of Ohio will be in order based upon the population data revealed thereby. In the interim, it is obvious that some population disparity between congressional districts will exist regardless of the basis used for allocation of electors to the various districts. It is equally obvious that had Ohio been districted in 1960 upon the basis of the then current federal census, at the present date substantial population inequality would exist between selected districts. No less can be said of a districting plan drawn today based upon 1960 population data. Had a districting plan of acceptable proportion been drawn in 1960, it would not be subject to attack today because of disproportion caused by population shift and growth. Some inequality is inevitable in the interim between censuses. (See comment by Sobeloff, J. in *Maryland Committee v. Tawes.*)

This is not a case in which the Court is called upon to exert its coercive powers over a recalcitrant legislature. The Ohio General Assembly, given the information presently available, undoubtedly will not be able to produce a districting plan immune to further litigation. (24) Time inevitably to be consumed by further litigation poses the threat of our ordering the 1968 congressional elections to be held at-large as the only remaining alternative.

The question remaining for our determination concerns the legislature's accomplishment of practicable equality of Ohio's 24 congressional districts as drawn by that body in 1964 to accommodate 1966 and subsequent elections. We do not believe that the decision of *Wesberry* and its progeny compels Ohio's redistricting body to legislate in retrospect. A court ought not apply a hindsight view to condemn legislative foresight, especially where

such foresight appears to have been borne out to a substantial degree.

We do not believe that we may resort to a purely mathematical exercise for the sake of expediency in resolving an issue of constitutional magnitude. This is clearly distinguishable from that of *Swann v. Adams*, for here the State has presented rational reasons for the seeming population variation between congressional districts. We find those reasons to be legally acceptable upon the principles we have articulated herein. The defendants having presented this proof, we find the plaintiffs have not only failed to rebut the State's proof but they have failed to offer any proof upon which a finding of invalidity may rest.

We hold that upon the facts presented, giving due recognition to purely academic propositions as well as to practical feasibility, the Ohio plan of districting affords practicable equality of congressional districts as is constitutionally required. The Court finds Section 3521.01 of the Ohio Revised Code to be constitutional in all respects.

The dissent filed herewith misconceives the thrust of our decision. We do not hold that an unconstitutional districting plan may be perpetuated for the sake of expediency. We do not refrain (25) from finding redistricting necessary because such an undertaking will be difficult. Nor do we withhold a decree ordering at-large elections merely to accommodate the settled voting districts of Ohio. Rather, we find from the proof presented by the State that there is no constitutional wrong to be corrected. Absent such a wrong there is no occasion for remedy. Practicable equality being the touchstone of validity announced by the Supreme Court of the United States, our observations regarding probable ramifications of our decisions serve only to buttress our prior determination of

the practicable equality of Ohio's present congressional districts.

The Attorney General is requested to prepare an appropriate decree in accordance with this opinion.

As may be required, this opinion is adopted as findings of fact and conclusions of law in accord with Rule 52(a), Federal Rules of Civil Procedure.

JAMES C. CONNELL,
Chief United States District Judge,

GIRARD E. KALBFLEISCH,
United States District Judge.

APPENDIX.

TABLE I.

District No.	*Am. Sub. H. B. 18*	*Census Bureau*
1	425,822	417,614
2	438,299	446,507
3	437,689	439,438
4	354,129	354,129
5	354,537	354,537
6	380,847	380,847
7	369,910	369,910
8	414,929	414,929
9	456,931	456,931
10	366,741	366,741
11	436,933	436,933
12	331,202	319,968
13	398,141	398,141
14	457,774	457,774
15	351,760	362,994
16	434,465	434,465
17	414,871	414,871
18	411,103	411,103
19	435,743	435,743
20	440,398	439,835
21	426,294	426,216
22	394,835	396,089
23	386,368	385,755
24	386,676	384,927
Population 1960		
Largest district	457,774	457,774
Average district	404,333	404,333
Smallest district	331,202	319,968
Per cent of variance from average district		
Largest district	+13.2%	+13.2%
Smallest district	—18.1%	—20.9%
Total % of variance	31.3%	34.1%
Population difference between largest and smallest districts	126,572	137,806
Ratio between largest and smallest districts	1.382:1	1.430:1

District No.	*Am. Sub. H. B. 18*	*Census Bureau*
Average % of variance of all districts	7.69%	7.71%
Districts above average	6.10%	6.93%
Districts below average	8.39%	8.40%
Number of districts with more than:		
5% variance	17	16
6% variance	14	14
7% variance	14	14
8% variance	12	12
9% variance	7	8
Per cent of population necessary to elect majority of Congressmen	46.2%	46.2%

Defendants offered current population estimates as of July 1, 1966 for Districts 12 and 15 as follows:

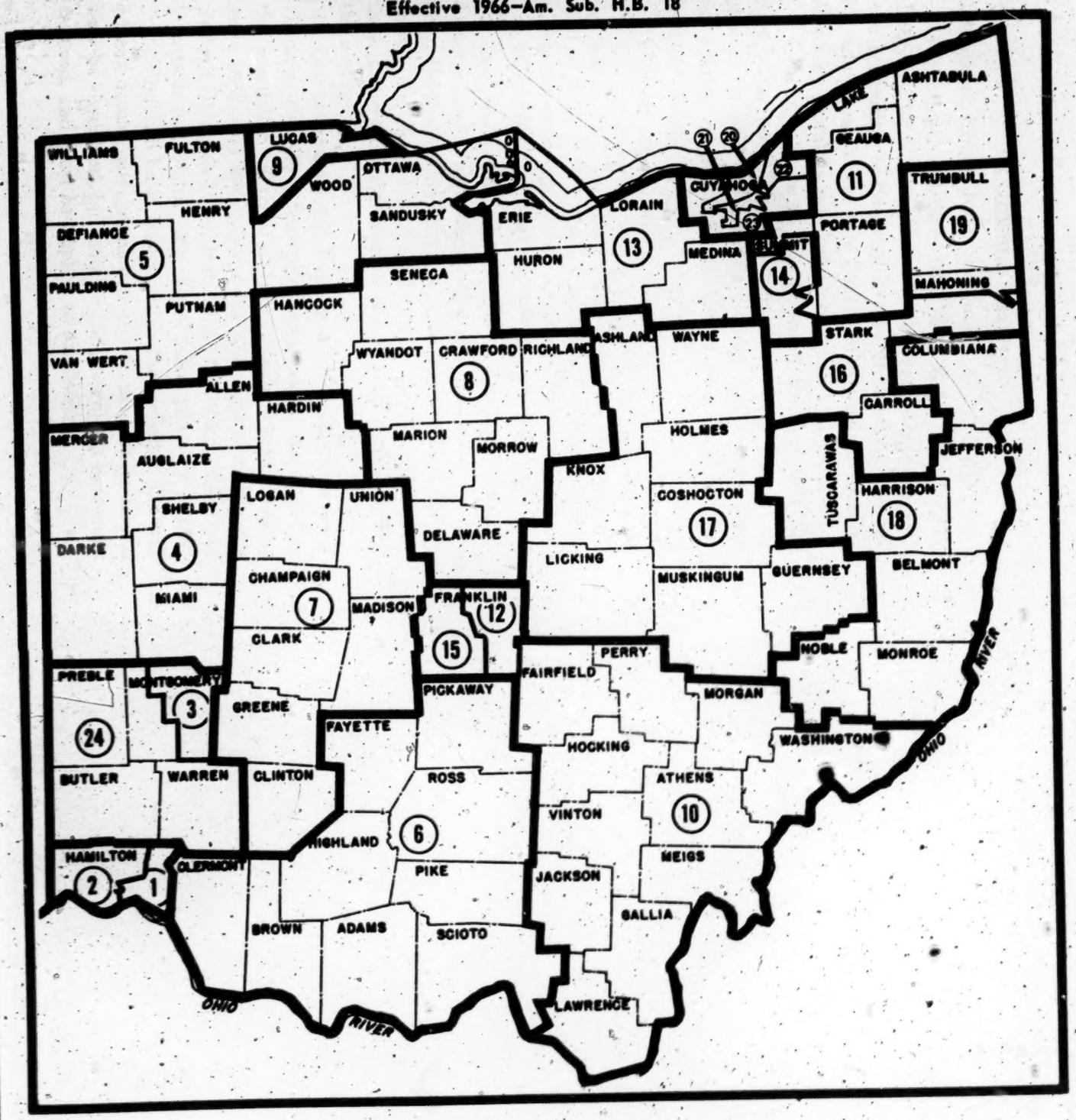
	Population Est. 1966	*Per Cent Deviation From Ideal*
District 12	396,817	—7.6%
District 15	439,678	+2.4%

According to defendants' figures, District 12 has increased approximately 20% during the interim since 1960. District 4 now appears as the smallest congressional district in the state. District 14 is still the largest. Deviations based upon this assumption are as follows:

	Population 1960	*Per Cent Deviation From Ideal*
Largest district	457,774	+13.2%
Smallest district	354,129	—12.4%
Total deviation		25.6%
Population difference between largest and smallest districts	103,645	
Ratio between largest and smallest districts	1.29 to 1	

NEW OHIO CONGRESSIONAL DISTRICTS

Effective 1966—Am. Sub. H.B. 18



CONGRESSIONAL DISTRICT POPULATIONS

DISTRICT NO.	1960 POPULATIONS	% DEVIATION FROM AVERAGE (404,433)	DISTRICT NO.	1960 POPULATIONS	% DEVIATION FROM AVERAGE (404,433)
1	425,822*	+ 5.3	13	398,141	- 1.6
2	438,299*	+ 8.4	14	457,774	+13.2
3	437,689*	+ 8.2	15	351,760	-13.0
4	354,129	-12.4	16	434,465	+ 7.4
5	354,537	-12.3	17	414,871	+ 2.6
6	380,847	- 5.8	18	411,103	+ 1.6
7	369,910	- 8.5	19	435,743	+ 7.7
8	414,929	+ 2.6	20	440,398*	+ 8.9
9	456,931	+13.0	21	426,294*	+ 5.4
10	366,741	- 9.3	22	394,835*	- 2.4
11	436,933	+ 8.0	23	386,368*	- 4.5
12	331,202	-18.1	24	386,676*	- 4.4

*Data supplied by the House Committee on Elections and Federal Relations, and the Conference Committee on Am. Sub. H.B. 18.

SOURCE : U.S. Bureau of the Census Data.

Ohio Legislative Service Commission
December 18, 1964

DISSENTING OPINION.

CELEBREZZE, Circuit Judge, dissenting.

Following *Kilgarlin v. Hill*, 35 U. S. Law Week 3293 (February 20, 1967), the majority correctly hold that "the conclusion is inescapable that in the congressional districting case before this Court the population equality shown by Plaintiffs requires justification by Defendants."

Keeping always in the forefront the fact that the largest District (14) varies from the average District by plus 13.2% and the smallest District (12) varies from the average by minus 20.9% (see Tables I and II), the majority state:

> "Current population estimates offered by the defendants, if accepted, would bring all 24 Ohio districts within 15% variation above or below the hypothetical ideal. * * * The acceptance of the current population estimates offered is essential to the defendants' achievement of that 15% maximum deviation."

Defendants maintain that the Ohio Legislature, in drawing new congressional districts, considered population growth estimates, especially the projected population growth for District No. 12, Franklin County. Based on these projections the District is now only slightly below the average.

One witness for the Defendants, from the Columbus (District No. 12) Chamber of Commerce, testified that the population of the 12th Congressional District as of July, 1966, was 396,817, and the total population for the State of Ohio was 10,305,000. Since 1960 (d.2) there was a growth for District No. 12 of approximately 70,000.

I find two basic objections to this defense. Current census figures and population trends may be used and may be significant, but reliable and convincing data must be used, and must be applied to all districts.

Historically, most states have used the Federal Census in determining the state's population. The Federal Census has been the most effective and reliable means of determining population figures. If a city's chamber of commerce is used as the census taker, there is present the problem of uniform and reliable data for the entire state. If the State of Ohio does not use the Federal Census, it must provide a more reasonable plan than mere adoption of a chamber of commerce population statistic for one or two of the twenty-four districts. I find it difficult to place the stamp of reliability on population estimates furnished by a city chamber of commerce. These estimates may serve a useful purpose for market analyses and sales promotions, but we are concerned here with the fundamental purpose of right of representation.

Assuming that District No. 12 did increase in population by 70,000, what happened to District No. 14 during the same period? The Defendants have not shown what population changes occurred in District No. 14 or the other districts. Equivalent data was not introduced in respect to twenty-two of the twenty-four districts. In effect Defendants advance the proposition that the projected population of (d.3) District No. 12, and the projected population of the entire State should be compared with the 1960 census figures for the rest of the congressional districts. This is not logical. The majority acknowledges this when they state:

> "* * * it may not be said that the overall redistricting is based upon such a degree of statistical stability and accuracy that proof of correctness of the legislative intuition in two specific instances demonstrates the validity of the entire plan."

The method for determining the population base is a difficult and open question. The reliable method at pres-

ent is to rely on the Federal Census. As the Court said in *Maryland Citizens Committee for Fair Congressional Redistricting v. Tawes*, 253 F. Supp. 731, p. 734:

> "A difficulty encountered by anyone who undertakes in 1966 to draw district lines with a view to achieving substantial population equality, is that the only accurate figures available are those from the 1960 census. The dilemma presents two possible choices; to accept the 1960 census figures which are not up to date, or to attempt to make estimates of changes in population figures since that date. Neither choice is a happy one, but we have concluded that it is better to adhere to the census figures than to engage in speculative estimates or projections which vary widely with the estimators and the manner in which they handle the figures available to them from various sources. The alternative we have rejected would indeed lead into a mathematical thicket."

If Defendants' projection population figures cannot be accepted, there appears, then, to be no other basis to support or accept the current population estimates which are essential to the Defendants' achievement of that 15% maximum deviation. Moreover, (d.4) Defendants' rationale for this 15% deviation is rather unique in that it is founded upon a Bill (H. R. 5505) introduced by Congressman Celler which adopted the figure of 15%. This Bill never became law. While the majority is correct in saying that we must "accept as true the facts of uneven population growth and population shifting among the 24 Ohio districts," there has been no showing how these population shifts have occurred in all the congressional districts. If the projected population growth estimates are not statistically reliable, then we must return to the basic disparity or total variance of 34.1%. This variance cannot be constitutionally justified.

The constitutional provision in Article I, Section 2, that congressional representatives be chosen "by the people of the several states" requires that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's," therefore the constitutional test for validity of congressional districting schemes is one of substantial equality of population among the various districts. *Wesberry v. Sanders,* 376 U. S. 1 (1964). Substantial equality of population among the various districts being the dominant factor, the limits of "practicability" have been construed to include only de minimis deviations from exact equality. *Calkins v. Hare,* D. C. Mich. (1964), 228 F. Supp. 824; *Preisler v. Secretary of the State of Missouri,* 257 F. Supp. 953, aff'd. sub nom. *Kirkpatrick v. Preisler,* (d.5) 35 U. S. L. W. 3233 (January 10, 1967).

Ohio's Redistricting Act involves an over-representation of 13.2% and an under-representation of 20.9%. The total percentage deviation between districts is 34.1%. District No. 4 has an under-representation of 12.4% and District No. 14 is over represented by 13.2%. Of equal significance is the fact that where the ideal district approximates 400,000 persons, District No. 12 has a population of 319,968, and the population difference between the largest and smallest districts is 137,806. A population disparity of over 100,000 cannot be said to be de minimis.

In *Reynolds v. Sims,* 377 U. S. 533 (1964) the Court pointed out that stricter adherence to equality of population between districts may more logically be required in congressional than in state legislative representation. In *Drum v. Seawell,* 250 F. Supp. 922, the State reapportionment was held constitutional despite the fact that the population variances were greater than those involved in the congressional redistricting which was held to be unconstitutional. A person either has an equal vote or

he does not. As in freedom of religion and freedom of the press, no scheme will be approved which is a little bit unconstitutional.

In determining whether a variation from the one to one ratio (d.6) is unavoidable and inevitable in such a task as congressional redistricting, and consequently labeled de minimis, the Court, in *Preisler v. Secretary of the State of Missouri, supra*, at pp. 973-974, said:

> "The concept that population and population alone is the sole standard for congressional representation requires that acceptance of invitations to examine population deviations and variations in terms of state mathematical formulae be limited to discussion of such matters only as they may tend to illuminate the factual situation presented in a particular case.
>
> "When legal arguments are based on the theory that a particular congressional districting scheme is only slightly unconstitutional and should be sustained because the votes of the population of a particular district are, in fact, overvalued and over weighted by 'only' a plus 9.9% deviation and a minus 9.6% deviation, to use the figures involved in this case, such arguments could be, and are in this case, firmly rejected.
>
> "We refuse to hold that the constitutional right of equal representation may be but slightly, and therefore permissibly, abridged on the theory that percentage figures and ratio numbers make unexplained and substantial population deviations and variances look smaller."

What the courts have considered in cases dealing with congressional redistricting as constitutionally impermissible population deviations are illuminating. See Table III. Every case (d.7) where the population difference between the largest and smallest district exceeded

100,000 held the congressional redistricting unconstitutional. Every case where the percentage of variance exceeded ten percent held the congressional redistricting unconstitutional, except *Grills v. Branigin,* S. D. Ind. (1966), 255 F. Supp. 155, and that case was reversed and remanded by the Supreme Court. In *Bush v. Martin,* 251 F. Supp. 484, 513, the Court said:

> "To make it absolutely clear that the maximum deviation of 10% should be the exception rather than the rule, we expressly hold that any congressional redistricting plan in which the districts on the average vary more than 5.5% from the ideal and under which less than 49.4% of the people can elect a majority of the State's congressmen (12) would be condemned for failure to represent a good faith effort for the present."

The variances in the Ohio congressional redistricting far exceed the variances held unconstitutional in most of the cases, and far exceed the variances tolerated in all of the cases holding the congressional redistricting constitutional.

The majority refers to the 1970 Federal Decennial Census and state that "it may well be that redistricting of the State of Ohio will be in order based upon the population data revealed thereby." The majority then go on to say that "the Ohio General Assembly, given the information presently available, undoubedly will not be able to produce a districting plan immune to further litigation. Time inevitably to be consumed by further litigation poses the threat of our (d.8) ordering the 1968 congressional elections to be held at-large as the only remaining alternative." The practical consequence of holding the Ohio Congressional Redistricting Act unconstitutional is not a legitimate legal factor to be considered by this Court. In effect the majority hold that the way to redress the wrong

committed is to perpetuate the wrong until 1970, when hopefully the Legislature will correct it. It would appear that the majority has applied the test of convenience rather than the test of substantial equality of population among the various districts. I cannot subscribe to this theory.

In *Preisler v. Secretary of the State of Missouri*, 257 F. Supp. 953, at 981, the Court said:

> "We recognize that the Supreme Court indicated in that case (Swann v. Adams, 383 U. S. 210) in no uncertain terms that, as a general and almost universal rule, the lower federal courts are not permitted to authorize further interim elections under constitutionally void apportionment schemes in cases in which state legislatures have been given full and fair opportunity to act in accordance with constitutional commands."

In *Maryland Citizens Committee v. Tawes*, 253 F. Supp. 731, at 734, the Court said:

> "Nor can we adopt this invalid measure on an interim basis for the 1966 election of members of Congress. * * * Even if disposed to permit another election upon the basis of a void statute, we should not do so because this would offend the rule of the Supreme Court in Swann v. Adams."

The equality of vote is the principal element of the strength of a nation, and is of paramount necessity for its permanence and (d.9) prosperity. It is also the reins by which its people guide its destiny. To permit it to be minimized, diluted or compromised is to endanger its stability and infect it with decay. The framers of the Constitution, aware of this, inscribed it indelibly in the Constitution by providing that "the House of Representatives shall be composed of members chosen every second year by the people of the several states," therefore, no

State Legislature, for whatever reason it may advance, has the power to minimize, dilute or compromise this right through the device of districts containing a widely varied number of inhabitants.

I would find that the Ohio Congressional Redistricting Act does not comply with the command of Article I, Section 2 of the Constitution of the United States, and is therefore constitutionally invalid.

TABLE I

Ohio Congressional District No.	*1960 Population*	*Percentage of Deviation from ideal*
1	417,614	+3.2
2	446,507	+10.4
3	439,438	+8.6
4	354,129	—12.4
5	354,537	—12.3
6	380,847	—5.8
7	369,910	—8.5
8	414,929	+2.6
9	456,931	+13.0
10	366,741	—9.3
11	436,933	+8.0
12	319,968	—20.0
13	398,141	—1.6
14	457,774	+13.2
15	362,994	—10.2
16	434,465	+7.4
17	414,871	+2.6
18	411,103	+1.6
19	435,743	+7.7
20	439,835	+8.7
21	426,216	+5.4
22	396,089	—2.1
23	385,755	—4.6
24	384,927	—4.8

An analysis of the population figures, in accordance with the tests and measurements adopted by the courts in congressional districting cases, is illustrated in Table II:

TABLE II

1. Population by 1960 census

Largest District (14)	457,774
Average District	404,333
Smallest District (12)	319,968

2. Percent (%) of Variance From Average District

Largest District (14)	+13.2%
Smallest District (12)	—20.9%
Total % of variance	34.1%

3. Population Difference between Largest and Smallest Districts 137,806

4. Ratio between Largest and Smallest Districts 1.430 to 1

5. Percent (%) of Population necessary to elect majority of congressmen 46.2%

TABLE III

*I—Cases Held Unconstitutional (*Affirmed by Supreme Court)*

Case	*Percent (%) of Variance From Average District*	*Population Difference Between Largest and Smallest Districts*	*Ratio Between Largest and Smallest Districts*
Wesberry v. Sanders 376 U. S. 1	—	430,368	—
Klahr v. Goodard 250 F. Supp. 537	—	465,274	—
Park v. Faubus 238 F. Supp. 62	Largest +28.84% Smallest —25.46%	242,541	1.73 to 1
Wilkins v. Davis 205 Va. 803, 139 S. E. 2d 849	—	214,208	—
Calkins v. Hare 228 F. Supp. 824	—	189,084	—
Lucas v. Rhodes *Instant Case*	Largest (14) +13.2% Smallest (12) —20.9%	137,806	1.430 to 1
*Drum v. Seawell (1) 249 F. Supp. 877	15%	—	—
Roberts v. Babcock 246 F. Supp. 396	—	126,379	—
*Maryland Citizens Com. etc., v. Tawes—253 F. Supp. 731	Largest +14.38% Smallest —14.90%	113,505	1.34 to 1
Baker v. Clement 247 F. Supp. 886	Largest +14.3% Smallest —14.0%	111,830	1.32 to 1
*Preisler v. Sec. State of Missouri—257 F. Supp. 953	Largest +9.9% Smallest —9.7%	84,655	—
Drum v. Seawell (2) 250 F. Supp. 922	Largest +8.39% Smallest —8.91%	71,640	—
*II—Cases Held Constitutional (*Reversed by Supreme Court)*			
*Grills v. Branigin 255 F. Supp. 155	Largest +7.2% Smallest —12.8%	84,545	1.2 to 1
Bush v. Martin 251 F. Supp. 484	Largest +9.7% Smallest —9.7%	80,892	1.22 to 1
Kirby v. Ill. State Electoral Board 251 F. Supp. 908	Largest +7.5% Smallest —6.1%	57,046	—
Moore v. Moore 246 F. Supp. 578	Largest +7.3% Smallest —6.0%	52,120	
Levitt v. Maynard 202 A. 2d 478		56,715	1.2 to 1
Meeks v. Avery 251 F. Supp. 245	Largest +1.507% Smallest —1.947%	15,060	1.035 to 1

APPENDIX B.

28 U. S. C. § 1253.

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, c. 646, 62 Stat. 928.

APPENDIX C.

SECTION 3521.01, OHIO REV. CODE.

For the purpose of election of representatives to Congress, the state is apportioned as follows:

First District. That portion of the county of Hamilton contained within the following boundaries constitutes the first district: Beginning at the intersection of the center line of Mill street and the low water mark of the Ohio river in the municipal corporation of Cincinnati; thence north in the center line of Mill street to the center line of West Third street; thence east in the center line of West Third street to the center line of Cutter street; thence north in the center line of Cutter street to the center line of Richmond street; thence east in the center line of Richmond street to the center line of Central avenue; thence north in the center line of Central avenue to the center line of Liberty street; thence east in the center line of Liberty street to the center line of Vine street; thence north in the center line of Vine street to the center line of St. Joe street to the center line of Rice street; thence north in the center line of Rice street to the center line of Winklr

street and the beginning of Ward 11. Following Ward 11 line, east in the center line of St. Joe street to the center line of Rice street; thence north in the center line of Rice street to the center line of Winkler street; thence east in the center line of Winkler street to the center line of McGrew street; thence north in the center line of McGrew street to the center line of Vestry street; thence south in the center line of Vestry street to the center line of Malvern Place; thence east in the center line of Malvern Place to the center line of Auburn Terrace; thence south in the center line of Auburn Terrace to the center line of Estelle street; thence east in the center line of Estelle street to the center line of Auburn avenue; thence north in the center line of Auburn avenue to the center line of East McMillan street and the beginning of Ward 12. Following Ward 12 line, east on East McMillan street to the center line of Burnet avenue; thence north in the center line of Burnet avenue to the center line of Erkenbrecher avenue; thence west in the center line of Erkenbrecher avenue to the center line of Vine street; thence south in the center line of Vine street to the south line of Section 15, T. 3, F. R. 2, M. P.; thence west on the said Section line to the center line of Ludlow avenue; thence northwestwardly in the center line of Ludlow avenue to the center line of Clifton avenue; thence south in the center line of Clifton avenue to the center line of Straight street; thence west in the center line of Straight street to the center line of Wagner street; thence north in the center line of Wagner street and its extension to an angle in the center line of Marshall avenue; thence northwardly in the center line of Marshall avenue to the first angle point in said center line north of Riddle road; thence eastwardly bisecting said angle to the easterly line of Clifton View Subdivision as shown on the plat

recorded in the court of common pleas record book No. 464, page 541, in the records of the clerk of the court of common pleas of Hamilton county; thence northwardly along the east line of said Clifton View Subdivision to the south line of J. C. Brotherton's Subdivision as recorded in Plat Book 6, page 179, Hamilton County Recorder's office records; thence east along the south line of said Subdivision 162 feet, more or less, to a point 27.80 feet west of the east line of Lot No. 20 of said J. C. Brothertons Subdivision; thence north parallel with the east line of said Lot No. 20 to the center of Dixmyth avenue and the south boundary line of Ward 15. Following Ward 15 line west along the center line of Dixmyth avenue to the center line of Central parkway; thence northwestwardly in the center line of Central parkway to the center line of Ludlow avenue; thence northwestwardly in the center line of Ludlow avenue to the center line of Hamilton avenue; thence north in the center line of Hamilton avenue to the center line of Pullan avenue; thence east in the center line of Pullan avenue to the southwest line of Ward 24. Following the 24th Ward line north and westwardly to the center line of Crawford avenue; thence northwardly in the center of Crawford avenue and the Ward line of the 24th Ward northwardly and east along the 24th Ward line to Gray road and the northwest boundary line of the former village of Winton Place as recorded in Plat Book 6, pages 1 to 6, inclusive, in the recorder's office of Hamilton county; thence east on the north boundary line of the former village of Winton Place to the westerly boundary line of the municipal corporation of St. Bernard; thence northwardly and eastwardly along the northwesterly boundary of the municipal corporation of St. Bernard to the intersection of Mill creek and the boundary line between the municipal corporations of St. Bernard and Elmwood Place; thence northwardly

along Mill creek to the center line of Seventy-first street in the municipal corporation of Cincinnati; thence eastwardly on a straight line to the intersection of the center line of Rosewood avenue (the B. & O. R. R.) and the extension of the center line of Sixty-ninth street; thence east in the center line of Sixty-ninth street to the center line of Fair Park avenue; thence north in the center line of Fair Park avenue to the center line of Seventy-fourth street; thence westwardly in the center line of Seventy-fourth street to the center line of North Bend road; thence in the center line of North Bend road west to Mill creek; thence northwardly and eastwardly along Mill creek to the corporation line of the municipal corporation of Cincinnati in the former Miami and Erie Canal; thence south along said corporation line to the south line of Sec. 1, T. 3, F. R. 2; thence east on said section line to the westward boundary line of the municipal corporation line of the village of Amberley and eastward corporation line of the municipal corporation of Cincinnati and the eastwardly Ward line of the 7th Ward; thence northwardly and westwardly along the Cincinnati municipal corporation line and Ward 7 line to the corporation line of Arlington Heights and the center line of Galbraith road, and the corporation line of the city of Reading; thence eastwardly, southwardly, and northwardly along the corporation line of the city of Reading to the southeast corner of the corporation line of the city of Blue Ash; thence northwardly along the west corporation line of the city of Blue Ash; continuing northwardly and westwardly along the corporation line of the municipal corporation of Sharonville to the southern boundary of Warren county; thence eastwardly along the southern boundary of Warren county to the Little Miami river; thence southwardly with the Little Miami river and the eastern boundary of Hamilton county to the northwest corner of Clermont

county; thence southwardly along the westerly boundary of Clermont county to the low water mark of the Ohio river; thence westwardly along the low water mark of the Ohio river to the point of beginning.

Second District. That portion of the county of Hamilton contained within the following boundaries constitutes the second district: Beginning at the intersection of the westerly line of the first district as above described and the low water mark of the Ohio river in the municipal corporation of Cincinnati; thence northwardly along the westerly line of the first district to the southern boundary of Warren county; thence westwardly along the southern boundaries of Warren county and Butler county to the eastern boundary of the state of Indiana; thence southwardly along the eastern boundary of the state of Indiana to the low water mark of the Ohio river; thence eastwardly along the low water mark of the Ohio river to the point of beginning.

Third District. That portion of the county of Montgomery which is not contained within the twenty-fourth district constitutes the third district.

Fourth District. The counties of Allen, Auglaize, Darke, Hardin, Mercer, Miami, and Shelby constitute the fourth district.

Fifth District. The counties of Defiance, Fulton, Henry, Ottawa, Paulding, Putnam, Sandusky, Van Wert, Williams, and Wood constitute the fifth district.

Sixth District. The counties of Adams, Brown, Clermont, Fayette, Highland, Pickaway, Pike, Ross, and Scioto constitute the sixth district.

Seventh District. The counties of Champaign, Clark, Clinton, Greene, Logan, Union, and Madison constitute the seventh district.

Eighth District. The counties of Crawford, Delaware, Hancock, Seneca, Marion, Morrow, Richland, and Wyandot constitute the eighth district.

Ninth District. The county of Lucas constitutes the ninth district.

Tenth District. The counties of Athens, Fairfield, Gallia, Hocking, Jackson, Lawrence, Meigs, Morgan, Perry, Washington, and Vinton constitute the tenth district.

Eleventh District. The counties of Ashtabula, Geauga, Lake, Portage, and that portion of Summit county consisting of the municipal corporations of Boston Heights, Lakemore, Macedonia, Mogadore, Northfield, Peninsula, Reminderville, Tallmadge, and Twinsburg, and the townships of Boston, Northfield Center, Richfield, Sagamore Hills, Springfield, and Twinsburg constitute the eleventh district.

Twelfth District. That portion of the county of Franklin contained within the following boundaries constitutes the twelfth district. Beginning at the intersection of the west boundary line of Sharon township and the north boundary line of Franklin county; thence southwardly along the west boundary line of Sharon township to the boundary line of the city of Worthington; thence westwardly along the boundary line of the city of Worthington across Linworth road; thence southwardly along the most westerly portion of the city of Worthington; thence east along the boundary line of the city of Worthington to the Olentangy river; thence southwardly along the Olentangy river to the boundary of the city of Columbus (as of November 1, 1964); thence westwardly along the boundary line of the city of Columbus to the west boundary line of Sharon township; thence southwardly along the

west boundary line of Sharon township to Bethel road; thence eastwardly along the center line of Bethel road across the Olentangy river and continuing eastwardly along the center line of the West Rathbone road to High street (all of Sharon township as of November 1, 1964, is to be included as a part of the twelfth district and all of the city of Columbus west of the Olentangy river and north of Bethel road as of November 1, 1964, is to be included in the fifteenth district); thence southwardly along the center line of High street to the center line of Broad street; thence eastwardly along the center line of Broad street to Alum creek; thence southwardly along the Alum creek to Watkins road; thence westwardly along the center line of Watkins road to the west boundary line of Madison township; thence southwardly along the west boundary line of Madison township, (as it existed on November 1, 1964,) to the south boundary of Franklin county; thence eastwardly along the south boundary line of Franklin county to the east boundary line of Franklin county; thence northwardly along the east boundary line of Franklin county to the north boundary line of Franklin county; thence westwardly along the north boundary line of Franklin county to the place of beginning.

Thirteenth District. The counties of Erie, Huron, Lorain, and Medina constitute the thirteenth district.

Fourteenth District. The county of Summit except the municipal corporations of Boston Heights, Lakemore, Macedonia, Mogadore, Northfield, Peninsula, Reminderville, Tallmadge, and Twinsburg, and the townships of Boston, Northfield Center, Ridgefield, Sagamore Hills, Springfield and Twinsburg constitutes the fourteenth district.

Fifteenth District. That portion of the county of Franklin contained within the following boundaries con-

stitutes the fifteenth district. Beginning at the intersection of the west boundary line of Sharon township and the north boundary line of Franklin county; thence southwardly along the west boundary line of Sharon township to the boundary line of the city of Worthington; thence westwardly along the boundary line of the city of Worthington across Linworth road; thence southwardly along the most westerly portion of the city of Worthington; thence east along the boundary line of the city of Worthington to the Olentangy river; thence southwardly along the Olentangy river to the boundary of the city of Columbus (as of November 1, 1964); thence westwardly along the boundary line of the city of Columbus to the west boundary line of Sharon township; thence southwardly along the west boundary line of Sharon township to Bethel road; thence eastwardly along the center line of Bethel road across the Olentangy river and continuing eastwardly along the center line of West Rathbone road to High street (all of Sharon township as of November 1, 1964, is to be included as a part of the twelfth district and all of the city of Columbus west of the Olentangy river and north of Bethel road as of November 1, 1964, is to be included in the fifteenth district); thence southwardly along the center line of High street to the center line of Broad street; thence eastwardly along the center line of Broad street to Alum creek; thence southwardly along Alum creek to Watkins road; thence westwardly along the center line of Watkins road to the west boundary line of Madison township; thence southwardly along the west boundary line of Madison township, (as it existed on November 1, 1964,) to the south boundary of Franklin county; thence westwardly along the south boundary line of Franklin county to the west boundary line of Franklin county; thence northwardly along the

west boundary line of Franklin county to the north boundary line of Franklin county; thence eastwardly along the north boundary line of Franklin county to the place of beginning.

Sixteenth District. The counties of Stark and Carroll and that part of Mahoning county consisting of the municipal corporations of Beloit, Canfield, New Middletown, Poland, Sebring, and that part of Washingtonville situated in Mahoning county, and the townships of Beaver, Berlin, Boardman, Canfield, Ellsworth, Goshen, Green, Smith, and Springfield and the township of Poland except in the municipal corporations of Struthers and Lowellville constitute the sixteenth district.

Seventeenth District. The counties of Ashland, Coshocton, Guernsey, Holmes, Knox, Licking, Muskingum, and Wayne constitute the seventeenth district.

Eighteenth District. The counties of Belmont, Columbiana, Harrison, Jefferson, Noble, Tuscarawas, and Monroe constitute the eighteenth district.

Nineteenth District. That portion of the county of Mahoning which is not contained within the sixteenth district and Trumbull county constitute the nineteenth district.

Twentieth District. That portion of the county of Cuyahoga, as contained on November 1, 1964, within the limits of wards 2, 3, 5, 6, 7, 8, 12, 21, 22, 23, 24, 25, 27, 31, 32, and 33, all in the municipal corporation of Cleveland, the municipal corporations of Bratenahl, Brooklyn, Brook Park, Linndale and the township of River Edge constitutes the twentieth district.

Twenty-first District. That portion of the county of Cuyahoga, as contained on November 1, 1964, within the limits of wards 9, 10, 11, 13, 14, 15, 16, 17, 20, 28, and 30,

all in the municipal corporation of Cleveland, the municipal corporations of Brooklyn Heights, Cuyahoga Heights, Garfield Heights, Newburg Heights, and Parma constitutes the twenty-first district.

Twenty-second District. That portion of the county of Cuyahoga, as contained on November 1, 1964, within the limits of wards 18, 19, 26, and 29, all in the municipal corporation of Cleveland, the municipal corporations of Cleveland Heights, East Cleveland, Euclid, Gates Mills, Highland Heights, Lyndhurst, Mayfield, Mayfield Heights, Richmond Heights, Shaker Heights, South Euclid, and University Heights constitutes the twenty-second district.

Twenty-third District. That portion of the county of Cuyahoga which is not contained within the 20th, 21st, and 22nd districts constitutes the twenty-third district.

Twenty-fourth District. The counties of Butler, Preble, Warren, and that part of Montgomery county consisting of the municipal corporations of Brookville, Farmersville, Germantown, Miamisburg, New Lebanon, Phillipsburg, Trotwood, Verona, West Carrollton, and the townships of Jackson, Jefferson, German, Miami, Perry, and the township of Clay except the municipal corporation of Clayton and the township of Madison except that portion of such township adjacent to the city of Dayton beginning at the boundary line of the city of Dayton at the intersection of Gettysburg avenue and Hoover avenue, thence westwardly along the center line of Hoover avenue to the intersection of the center line of Hoover avenue with the center line of Harmon avenue, thence southwardly along the center line of Harmon avenue and Victory drive to the boundary line of the city of Dayton constitute the twenty-fourth district.

The boundary lines of counties, municipal corporations, townships, and wards referred to in this section are the boundary lines of such counties, municipal corporations, townships, and wards as they existed on November 1, 1964.

SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1971.

No. 568

CHARLES P. LUCAS, BRUCE GREEN, JR., DOROTHY M. BACON, JOHN T. GREEN, ALFRED HEAD, EDWIN L. PARMS, KENNETH W. CLEMENT, RUSSELL M. JONES and ALICK LEE,

Appellants,

v.

JAMES A. RHODES, INDIVIDUALLY and AS GOVERNOR OF THE STATE OF OHIO, TED W. BROWN, SECRETARY OF STATE OF OHIO, JOSEPH J. LaPRESTI, GOVERNOR'S ADMINISTRATOR, and RAY T. MILLER, ALEXANDER B. DEMAIORIBUS, DAN W. DUFFY and GAUL G. SHELLHAAS, MEMBERS OF BOARD OF ELECTIONS OF CUYAHOGA COUNTY, OHIO,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT IN AND FOR THE NORTHERN DISTRICT OF OHIO.

MOTION TO AFFIRM ORDER OF FEDERAL DISTRICT COURT BECAUSE OF INSUBSTANTIALITY OF QUESTIONS PRESENTED

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. _____.

CHARLES P. LUCAS, BRUCE GREEN, JR., DOROTHY M. BACON, JOHN T. GREEN, ALFRED HEAD, EDWIN L. PARMS, KENNETH W. CLEMENT, RUSSELL M. JONES and ALICE LEV,

Appellants,

vs.

JAMES A. RHODES, INDIVIDUALLY and AS GOVERNOR OF THE STATE OF OHIO, TED W. BROWN, SECRETARY OF STATE OF OHIO, JOSEPH J. LoPRESTI, GOVERNOR'S ADMINISTRATOR, and RAY T. MILLER, ALEXANDER L. DeMAIORIBUS, DAN W. DUFFY and SAUL G. STILLMAN, MEMBERS OF BOARD OF ELECTIONS OF CUYAHOGA COUNTY, OHIO,

Appellees.

On Appeal From the United States District Court In and For the Northern District of Ohio.

MOTION TO AFFIRM ORDER OF FEDERAL DISTRICT COURT BECAUSE OF INSUBSTANTIALTY OF QUESTIONS PRESENTED.

QUESTION PRESENTED.

Does the present Ohio plan of congressional districting, which was passed in December, 1964 and was first effective with the 1966 elections, meet the "as nearly as practicable" test when the District Court found that because of population shifts since the last census, it would not be possible to create a more equal plan until new census figures were available?

STATEMENT.

Appellants attack the validity of the Ohio Congressional Districting act which was passed in 1964, following this Court's decision in *Wesberry v. Sanders*, 376 U. S. 1. Although there was no court case pending, the legislature of its own volition, attempted to comply with the *Wesberry* ruling. The plan first took effect with the congressional election of November, 1966. Appellants filed this suit some five months after the plan was enacted, but never requested that it be set for trial. When they were informed of a trial date, appellants requested that the case be postponed until after the 1966 elections. (Opinion, p. iii.)[1]

After a hearing which included exhibits and oral testimony, the three judge District Court held that "the Ohio plan of districting affords practicable equality of congressional districts as is constitutionally required." (Opinion, p. xxvi.)

Based upon Census Bureau information released in August, 1966, but using 1960 figures, the following statistics apply to the plan here attacked: districts with population in excess of the ideal district had an average variance of 6.93%, and those below had an average variance of 8.4% from the ideal. (Opinion, appendix, p. xxix.) The largest district was 13.2% over the ideal and the smallest was 20.9% under. (Opinion, appendix, p. xxviii.) However, by the time the plan went into effect in 1966, this smallest district had increased in population until it was only 7.6% under the ideal. (Opinion, appendix, p. xxix.) The 12th and 15th districts, which were under the ideal on the 1960 figures, had increased in population 24% and

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[1] Unless otherwise stated, all citations are to material printed in the appellant's jurisdictional statement, or the appendix thereto, and page references are to the pages as they appear in that jurisdictional statement and appendix.

21% respectively since 1960 (computed from figures at Opinion, appendix, pp. xxviii and xxix) while the statewide population had grown only 6.2%. (Figures at TR 93 compared to figures in Appellant's exhibit 2, page 11.)

The district court found:

> "The evidence and the exhibits offered upon the trial of this case compel us to accept as true the facts of uneven population growth and population shifting among the 24 Ohio Districts, as well as the total increase of the population of the state since 1960." (Opinion, p. xxii.)

and the Court further stated, "we are unable to find that resort to the 1960 federal census in 1967 will achieve a population disparity of any lesser degree" than the present plan. (Opinion, p. xxiv.)

The notice of appeal states that one question is whether Section 3521.01, Ohio Revised Code (Establishing the districting plan here attacked) violates the 14th Amendment of the United States Constitution. That question was presented in plaintiff's complaint, but on the trial of the case plaintiffs specifically abandoned any claims under the 14th Amendment. (Opinion, pp. iv and v.)

ARGUMENT.

In spite of the fact that the 14th Amendment claims were abandoned in the trial court, appellants have listed them as issues in the notice of appeal. Because they specifically abandoned the claim under the 14th Amendment, it is manifest that those questions are so unsubstantial as to need no further argument.

The only remaining real question is whether the present Ohio districting plan can constitutionally be used until such time as new and current population statistics are available.

The evidence shows that the 1960 census figures no longer accurately reflect population density, but there are no later statewide statistics upon which to base a plan. The District Court found that Ohio's population had grown unevenly, and that population shifts had occurred since the 1960 census. (Opinion, p. xxii.) This is obviously true even though current figures are not available for all of the districts. For example, districts 12 and 15, which are shown as underpopulated on the 1960 figures, had increased 24% and 21% respectively by the time this plan went into effect. (Computed from figures at Opinion, appendix, pp. xxviii and xxix), while the statewide population had increased only 6.2%. (Figures at TR 93 compared to figures in Appellants' Exhibit 2, page 11.) Because the new districts were super-imposed on the old 1960 census figures, which had not been tabulated along the same political subdivision lines, there is no certainty as to the 1960 population of some of these districts. For example, the Ohio Legislative Service Commission published 1960 population figures for the new districts at the time the plan was enacted in December, 1964. Twenty months later, in August, 1966 the U. S. Census Bureau also published 1960 census figures for the new districts. In ten of the districts there was disagreement between the two sources, with the differences amounting to approximately 11,000 people in both the 12th and 15th districts, and to more than 8,000 in the 1st district. (Opinion, appendix, p. xxviii.)

Because of the population growth, when the legislature passed the present plan in December, 1964, the census figures were already outdated, and had the legislature made every district exactly equal, based upon the 1960 census, districts such as the 12th would have been 18% overpopulated by the time of the first election in 1966. (25% increase for the 12th district, minus the state average increase of 6.22%.)

It was this fact which caused the legislature, when it passed the present plan in December, 1964, to take into consideration population growth figures in those instances where they were available. (Opinion, pp. xxi and xxii.) Agencies of the State of Ohio do not presently provide statewide census data. (Opinion, p. xxiv.)

In connection with this fact of uneven growth patterns the District Court stated:

> "The evidence and the exhibits offered upon the trial of this case compel us to accept as true the facts of uneven population growth and population shifting among the 24 Ohio Districts, as well as the total increase of the population of the state since 1960." (Opinion, p. xxii.)

Because of this highly uneven population growth the District Court stated: "we are unable to find that resort to the 1960 federal census in 1967 will achieve a population disparity of any lesser degree." than the present plan. (Opinion, p. xxiv.) Therefore the District Court held the present plan was as equal as practicable.

The District Court found that because of the population shifts since 1960, an attempt to create new districts before the next census would not result in a plan which was any more equal than the present one. Even if it appeared exactly equal by using the 1960 census figures, subsequent population shifts would result in there actually being population variances as great, if not greater than those under the present plan. (Opinion, pp. xxiii, xxv.) Therefore the Court held the present plan was as equal as practicable.

This is not a case where the present plan is attacked as arbitrary, or as a result of invidious discrimination. (Opinion, pp. iv and xxi.) Appellants' only contention in the trial court was that the population of the districts was

not as equal as practicable. However, they base this claim upon the outdated 1960 census figures.

The District Court stated the problem as follows: "There is apparently nothing here but a constitutional question which the plaintiffs seek to reduce to an arithmetical question, but which carries with it problems too complex for the slide rule and too elusive for the computer." (Opinion, p. xxi.) As the court said,

> "In 1960 Ohio's population was approximately 10 million, which, divided by 24 districts, equals 416,666 per district. Obviously there is no possible way in which this State, with its 88 counties, its lake and river boundaries, its increasing city populations, its diverse industries attracting its workers from within and without the State, can be divided into 24 districts each of which shall hold exactly 416,666 people." (Opinion, p. xviii.)

As this Court wisely said in *Reynolds v. Sims*, 377 U. S. 533, 578 (1964), "What is marginally permissible in one state may be unsatisfactory in another, depending upon the particular circumstances of the case," or as expressed in *Swann v. Adams*, 17 L. Ed. 2d 501, 505, 87 Sup. Ct. 569, 572 (1967) "the fact that a 10% or 15% variation from the norm is approved in one state, has little bearing on the validity of a similar variation in another state."

CONCLUSION.

For these reasons defendants respectfully urge that the plan of Congressional districting presently in use in Ohio provides a system of districting which is as equal as practicable at this time, seven years after the national census, and that the District Court was correct when it found that because of the population shifts which have

occurred since 1960, it would be impossible to create a new plan prior to 1970 which would be any more equal than the present system. Wherefore, it is respectfully submitted that the decision of the United States District Court should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

LUCAS ET AL. *v.* RHODES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

No. 568. Decided December 4, 1967.

PER CURIAM.

The judgment is reversed and the cause is remanded to the United States District Court for the Northern District of Ohio. *Wesberry* v. *Sanders*, 376 U. S. 1 (1963).

MR. JUSTICE HARLAN, with whom MR. JUSTICE STEWART joins, dissenting.

Because of the uninformative nature of the Court's reversal, some exposition of the issue in this case is necessary as a predicate for my view that the judgment of the District Court should be affirmed. My point of departure is, of course, *Wesberry* v. *Sanders*, 376 U. S. 1, a decision with which I am in continuing disagreement, see 376 U. S., at 20 *et seq.*, 50–51, but by which I consider myself bound.

The appellants, Ohio voters, challenge the constitutionality of Ohio's 1964 congressional redistricting statute. They assert that the redistricting plan does not satisfy the standard of population equality laid down in *Wesberry* v. *Sanders*, *supra*, because some of the resulting districts vary as much as 13% above and 18% below the population average, according to the 1960 census. In the District Court, the appellees, state officials, defended on the ground that the Ohio legislature had properly taken into account unofficial, post-1960 population figures which were available for some counties, and which seemed to bring the 1964 redistricting into line with *Wesberry*.

The majority below apparently held that these unoffi-

cial population statistics were insufficient to justify the disparity among districts because they were too unreliable and not available for all areas. However, the majority went on to uphold the districting plan because

> "although the varied sources of population information used by the Ohio legislature may lack uniformity of the federal census and the percentage deviations between selected Ohio districts may exceed that generally found acceptable in other states, we are unable to find that resort to the 1960 federal census in 1967 will achieve a population disparity of any lesser degree."

Given these circumstances, I believe that the Ohio plan has not been shown to be unconstitutional, even prima facie. This Court held in *Wesberry, supra*, at 7–8, that "as nearly as practicable one man's vote in a congressional election [must] be worth as much as another's." However, mathematical exactness was not required of a redistricting plan, 376 U. S., at 18, and what is marginally allowable in one State may be unacceptable in another, cf. *Reynolds* v. *Sims*, 377 U. S. 533, 578. It seems to me that by failing to heed the District Court's evident recognition that substantial shifts in population among Ohio's congressional districts had taken place since the federal census of 1960, this Court has now given to *Wesberry* a Procrustean tenor which the opinion in that case does not evince.

I would affirm the judgment of the District Court.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.